
ARTICLES

Insurance Regulation in Alaska: Healthy Exercise of a State Prerogative

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This article provides a general overview of the evolution of insurance regulation as a state function, focusing primarily on Alaska's regulatory scheme. The article begins by tracing the development of state insurance regulation, from its beginnings in the early nineteenth century to Congress's passage of the McCarran-Ferguson Act over one hundred years later. The article then examines the successes and failures of state regulation and discusses attempts at, and the potential for, significant federal involvement in insurance regulation. Against this backdrop, the article provides a detailed discussion of insurance regulation in Alaska from territorial days to the present, with particular emphasis on the current statutory framework.

I. INTRODUCTION

Throughout history, social and economic institutions as well as religion itself have provided security to people against the uncertainty of loss.¹ For most people today, however, insurance has

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1. Historically, individuals facing loss or hardship relied on the largess of community or kinship ties. It has been suggested that the capitalist revolution which supplanted feudal society in Western Europe also destroyed this community support structure. See Spencer L. Kimball, *The Purpose of Insurance Regulation*:

replaced these methods. Due to the great potential for fraud and abuse in the insurance industry, and the insurance industry's importance in providing social and economic security, the government has sought to regulate the activities of insurers.²

Alaskan insurance consumers have yet to experience the impact of large scale insurance fraud.³ Nevertheless, in the past few years, isolated instances of insurance fraud have abounded, including situations in which commercial fishermen have paid premiums for insurance that they learned did not exist after their vessels sank; agents have accepted and absconded with insurance premiums without securing coverage; brokers have wrongfully refused to return insurance premiums to insureds after their policies were cancelled, instead using the monies for personal gain;

A Preliminary Inquiry in the Theory of Insurance Law, 45 MINN. L. REV. 471, 480 (1961). The International Red Cross, church-sponsored organizations and government relief programs are examples of contemporary, non-obligatory means of alleviating loss resulting from catastrophes.

2. Commentators have noted that "[t]he underlying reason for insurance regulation is to protect the public from incompetent and fraudulent insurers." R. MEHR ET AL., *PRINCIPLES OF INSURANCE* 714 (1980); *see also* Northern Adjusters, Inc. v. Department of Revenue, 627 P.2d 205, 207 (Alaska 1981) (stating that the insurance code was enacted to "protect the Alaskan insurance consumer"). Consumers are vulnerable not only to fraud, but to an inequity in bargaining power and the fact that insurance policies are drafted by the insurer on a "take it or leave it" basis. This acknowledged inequity remains a fundamental part of insurance law. *See, e.g.*, 13 JOHN A. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 7401, at 211 (1976); *Whispering Creek Condominium Owner Ass'n v. Alaska Nat'l Ins. Co.*, 774 P.2d 176, 177-78 n.1 (Alaska 1989). In addition, states have a strong interest in regulating unfair claims settlement practices, *see* ALASKA STAT. § 21.36.125 (1993); ALASKA ADMIN. CODE tit. 3, §§ 26.010-.300 (July 1993), and unfair business practices such as (1) rebating, *see generally* ALASKA STAT. §§ 21.36.100, 21.36.120 (1993); (2) twisting (that is, fraudulently inducing an insured to change insurance companies), *see id.* § 21.36.050; (3) misrepresentation, *see id.* §§ 21.36.030, 21.36.040; and (4) discrimination, *see id.* §§ 21.36.090, 21.36.120, 21.84.480.

3. There have been some close calls. Circumstances surrounding one insurer's recent denial of admission to transact insurance business in Alaska illustrate the need for regulatory oversight. The owners of an insurance company purchased it from themselves with the company's own money, including use of an assignment of ownership in worthless property. Predictably, the company later became insolvent and was liquidated in Utah. And, in a remarkable example of fraud, in 1993 another insurer attempting to sell insurance to Alaskan chiropractors represented that it was domiciled in an island country in the Pacific named The Federal Republic of Corterra—a country which was later determined not to exist. The company was ordered to cease and desist transacting business in Alaska.

unlicensed agents and brokers have sold insurance policies to unwary customers to take advantage of the fleeting opportunity to earn commissions; and producers have issued certificates of insurance to potential claimants for non-existent coverage. In this complex financial services industry, the threat to consumers is real. There is a clear need for an insurance regulatory agency that can not only respond quickly to perceived problems but can take actions to prevent such abuses.

Such regulation is necessary, in large part, because of the pervasive impact the insurance industry has on our society. On an individual level, people need insurance for their cars, health, homes and businesses,⁴ and most states mandate insurance for workers' compensation and financial responsibility for automobile liability.⁵ Consisting of more than 5000 insurers nationwide, by 1989 the insurance industry administered assets of more than \$1.8 *trillion*.⁶ Insurance companies and related service industries, including brokers, agents and adjusters, employ nearly 2.5 million persons.⁷ The insurance industry accounts for nearly \$100 billion of the gross national product ("GNP") of the United States, with insurance premiums alone accounting for more than seven percent of the GNP.⁸ In 1991, state insurance regulatory agencies collected \$8.1 billion in revenues, ninety-one percent of which came from taxes on the insurance industry.⁹

4. In 1989, more than 95% of all homeowners had household insurance, approximately 85% of all automobile owners had automobile insurance and roughly 70% of the population possessed some type of life insurance. ARTHUR ANDERSEN & CO., *THE INSURANCE INDUSTRY* 3 (1991). Insurance expenditures account for 5.8% of all spending by American households. BRIAN W. SMITH, *ALLIANCE OF AMERICAN INSURERS, THE INSURANCE INDUSTRY: A KEY PLAYER IN THE U.S. ECONOMY* 1 (4th ed. 1992).

5. *E.g.*, ALASKA STAT. § 23.30.075 (1990) (workers compensation); *id.* § 28.22.011 (1989 & Supp. 1992) (financial responsibility for motor vehicles).

6. ARTHUR ANDERSEN & CO., *supra* note 4, at 1. Assets administered by United States life insurance companies nearly tripled between 1981 and 1991.

7. UNITED STATES DEP'T OF COM., *STATISTICAL ABSTRACT OF THE UNITED STATES* 407, 494 (1992). According to the Alliance of American Insurers ("AAI"), Alaska, with 1800 employees in the insurance industry, is second only to Wyoming as the state with the fewest individuals employed in this field. SMITH, *supra* note 4, at 12.

8. *See* U.S. DEP'T OF COM., 1991 SURVEY OF CURRENT BUSINESS 27.

9. NATIONAL ASS'N OF INS. COMM'RS, *SPECIAL RESEARCH REPORT* 3 (1993). Recently in Alaska, over \$1.8 billion in annual insurance premiums was collected for admitted insurance, and over \$43 million was collected for surplus

Many of the largest corporations in America are insurance entities,¹⁰ typically organized as holding companies for a diverse array of insurance products, leading one recent congressional report to declare that "[t]he business of insurance in the United States is, clearly, big business. . . . [A]lmost every American, in one way or another, is touched by the industry's impact upon our economy."¹¹ Insurance companies sell a unique and important product that is of critical importance to world commerce as well as to the security of businesses and individuals.¹² One uninsured loss can devastate an otherwise successful business, and life and health insurance provide needed financial security in the case of death or sickness in the

lines insurance premiums. In addition, more than 1050 insurers have been admitted to transact business, and more than 6,000 licenses for agents, brokers and adjusters have been obtained through the Division of Insurance. ALASKA DEP'T OF COM. AND ECON. DEV., DIV. OF INS., 54TH ANNUAL REPORT 3, 18 (1992). In 1992, allocated loss adjustment expenses for admitted insurers in Alaska alone exceeded \$52 million, a large portion of which was paid to appointed insurance defense counsel. ALASKA DIV. OF INS., 1992 DIRECT ALLOCATED LOSS ADJUSTMENT EXPENSES INCURRED 1.

10. As of December 31, 1991, the largest American life-health insurers by admitted assets were: (1) Prudential Insurance Company of America (\$148 billion); (2) Metropolitan Life Insurance Co. (\$110 billion); (3) Teachers Insurance and Annuity Association (\$55 billion); and (4) Aetna Life Insurance Co. (\$52 billion). New York Life Insurance Company, a major player in Alaska, was sixth with assets of \$42 billion. *Leaders by Category*, BEST'S REV., July 1992, at 2.

As of December 31, 1991, the largest property-casualty insurers by admitted assets were: (1) State Farm Mutual Automobile Insurance Co. (\$42.6 billion); (2) Travelers Insurance Co. (\$35.6 billion); and (3) Allstate Insurance Co. (\$23.7 billion). See BEST'S INSURANCE REPORTS, PROPERTY-CASUALTY xxiv - xxvii (1992).

"Admitted assets" is a term of art in the insurance industry, referring to the assets state regulators consider in measuring an insurer's solvency. See generally MEHR ET AL., *supra* note 2, at 747-48; ALASKA STAT. §§ 21.18.010, 21.18.900(1), (6) & (8) (1993).

11. SENATE PERMANENT SUBCOMM. OF THE COMM. ON GOVERNMENTAL AFFAIRS, SECOND INTERIM REPORT ON U.S. GOVERNMENT EFFORTS TO COMBAT FRAUD AND ABUSE IN THE INSURANCE INDUSTRY: PROBLEMS WITH THE REGULATION OF THE INSURANCE AND REINSURANCE INDUSTRY, S. REP. NO. 310, 102d Cong., 2d Sess. 1 (1992).

12. Insurance companies have been described as quasi-public financial institutions whose regulation is essential not only to protect policyholders, but also to maintain stability in domestic and foreign financial markets. See EDWARD B. RAPPAPORT, CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS: INSURANCE COMPANY INSOLVENCY 1 (1989).

family. Clearly, the insurance industry provides a vital service which has a pervasive influence on American life.

In essence, insurance is a promise to pay all or part of the costs associated with some future event, in consideration for the payment of premiums by a policyholder in advance of the event.¹³ The simplicity of the insurance concept, however, contrasts with the extreme complexity of its implementation.¹⁴ Among other things, insurers must successfully choose which risks to insure, decide what types of insurance to market,¹⁵ determine the proper premium, manage and invest the premium funds, share risks through reinsurance, establish adequate reserves, handle claims and provide quality customer service.¹⁶

With annual premium income in the billions and outstanding contracts affecting millions of people in every phase of American business and society, insurance clearly affects the public interest

13. Insurance is aleatory in nature—that is, a central condition of the contract is an uncertain event. *See* *Wade Oilfield Serv. Co. v. Providence Washington Ins. Co. of Alaska*, 759 P.2d 1302, 1307 (Alaska 1988). Where the uncertain event does not materialize, the insured's premium payments are not recovered, resulting in profit for the insurer. On the other hand, if the event does occur, the insurer may pay an amount much larger than the sum of the premiums it has collected. Thus, insurance is often compared to gambling, and the Anglo-American values and public policies in recent centuries reflecting disdain for gambling contracts impacted the insurance institution, creating the doctrine of insurable interest to distinguish permissible contracts of insurance from illegal wagers. *See* EDWIN W. PATTERSON, *CASES ON THE LAW OF INSURANCE* 112-14 (3d ed. 1955). *See also* ALASKA STAT. § 21.42.030 (1993) (requiring an insurable interest in property insured).

14. It has been stated that "few fields match in complexity that of the regulation of insurance." JOHN G. DAY, *ECONOMIC REGULATION OF INSURANCE IN THE UNITED STATES* iii (1970).

15. Although insurers market well over 50 types of insurance, most insurance can be classified generally as either first-party or third-party insurance. The former protects the insured for direct loss, BLACK'S LAW DICTIONARY 804 (6th ed. 1990), whereas the latter protects the insured for liability arising from damages to third parties. *State Farm Fire & Casualty Co. v. Nicholson*, 777 P.2d 1152, 1154 n.2 (Alaska 1989) (citing W. SHERNOFF ET AL., *INSURANCE BAD FAITH LITIGATION* § 3.01, at 3-3 (1987)).

16. A study suggests that auto and home insurance lines, two of the most prevalent types of insurance in our society, can increase profits 81% by increasing customer retention rates a mere 5%. *See* P. Haapaniemi, *Making 'Good Things Happen,' SOLUTIONS*, Spring 1993, at 10. Hence, customer satisfaction with the insurance claims process is very important.

and is an industry that requires regulation.¹⁷ Both the United States Supreme Court and Congress have recognized this need. In a 1914 case, the Court declared that "the business of insurance so far affects the public welfare as to invoke and require governmental regulation."¹⁸ Subsequent judicial decisions have determined that insurance regulation falls within state police powers.¹⁹ In addition, in 1945 Congress passed the McCarran-Ferguson Act,²⁰ which formally recognized the states' power to regulate insurance, declaring that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."²¹ Because of this long-standing relation between the insurance industry and the public interest, the industry

17. For the purpose of this article, insurance regulation contemplates control over all aspects of the insurance industry through legislation, judicial decisions or administrative activity of a state insurance regulatory agency, its employees and officers. This includes, but is not limited to, the oversight of insurance companies, agents, brokers, solicitors, and adjusters.

18. *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 412 (1914). The Court went on to state:

[I]t may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals.

Id. at 413.

19. See *Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co.*, 291 U.S. 352, 360 (1934) ("The business of insurance is one peculiarly subject to supervision and control."); *Burstein v. State Bar of Cal.*, 693 F.2d 511, 522 (5th Cir. 1982) ("Insurance is, of course, an industry traditionally highly regulated by the state."); *Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17, 29 (Iowa 1977) ("[T]his court has long recognized the insurance business is peculiarly subject to special supervision and control."); *Bankers Life & Casualty Co. v. Alexander*, 45 N.W.2d 258, 263 (Iowa 1950) ("Statutes which regulate the insurance business are remedial in character, enacted under the state's police power upon the theory the business is impressed with a public interest and the public is entitled to protection against illegal practices.").

20. 15 U.S.C. §§ 1011-1015 (1988).

21. *Id.* § 1011. Although a territory at the time the statute was enacted, Alaska was included within the definition of "State." *Id.* § 1015.

has evolved into one of the more highly regulated business activities in the country.²²

The purpose of this article is to provide a general overview of the national evolution of insurance regulation, focusing on Alaska's current regulatory scheme, recent developments in the insurance field which may affect Alaskans and a description of the enforcement powers of Alaska's Division of Insurance. Section II provides an historical overview of insurance regulation in the United States. Section III discusses the McCarran-Ferguson Act and its effect on state regulation, as well as attempts at federal regulation. The article concludes with section IV, which provides a detailed discussion of insurance regulation in Alaska from territorial days to the present, including a brief description of Alaska's administrative and enforcement mechanisms. While a survey of this nature cannot speak to all issues that comprise the vast universe of insurance regulation, this article's primary objective is to give the reader a general understanding of insurance regulation with an emphasis on the evolution of Alaska's regulatory scheme.

II. AN HISTORICAL VIEW OF INSURANCE REGULATION IN THE UNITED STATES

Insurance regulation began as a state function. The right of the states to charter corporations facilitated early state regulation of insurance companies. Initially, state regulation emphasized the taxation of insurance premiums and insurance stock.²³ New York

22. A well-known commentator on insurance regulation has stated:

As insurance became widespread, it involved the transfer, and in its more sophisticated forms the accumulation, of substantial amounts of liquid capital. In the twentieth century, assets of insurance companies and similar financial institutions became large in relation to the total wealth of the nation, and came to have a large impact on the process of capital formation and the capital structure of enterprise.

SPENCER L. KIMBALL, *INSURANCE AND PUBLIC POLICY* 250 (1960). Recently, the financial health of insurers has become a national concern:

As the decade of the 1980's ended, the American public and the insurance industry were slowly emerging from a period in which consumer confidence in the nation's financial system had substantially eroded. Confidence in financial institutions had been shaken by the savings & loan debacle, Wall Street scandals, the collapse of the real estate market, and the heightened visibility of insurance company insolvencies—notably among property/casualty insurers.

A.M. BEST CO., *SPECIAL REPORT, BEST'S INSOLVENCY STUDY 1* (1992).

23. The power of states to tax insurers is expressly recognized in the McCarran-Ferguson Act. See *supra* text accompanying note 21.

instituted the first premium tax in 1824,²⁴ and Connecticut imposed a tax on insurance stock in 1830.²⁵ While the revenue from premium taxes was originally imposed in part to help defray regulation expenses, today, state insurance regulatory agencies actually use only a small portion of such revenue,²⁶ reserving the vast majority for other state services.²⁷

With the exception of reporting requirements,²⁸ which insurance companies were subject to under a state's corporations code,²⁹ insurers in the first half of the nineteenth century remained essentially self-regulating. As the complexity of regulation increased, however, states recognized that regulators with expertise in insurance were necessary. Eventually, they formed separate state offices or agencies to deal with insurance regulation. In 1851 New Hampshire became the first state to create a full-time Board of Insurance Commissioners.³⁰ That same year, New York began requiring all insurers to provide security deposits with the state and

24. Act of Nov. 19, 1824, ch. 277, 1822-1824 N.Y. Laws 340.

25. Act of June 4, 1830, ch. 28, 1830 Conn. Pub. Acts 305-06. Today, all states derive substantial revenue from taxing the insurance industry. For example, in 1991 California and Texas collected approximately \$1.2 billion and \$555 million in premium and retaliatory taxes respectively. NATIONAL ASS'N OF INS. COMM'RS, 1991 INSURANCE DEPARTMENT RESOURCES REPORT 23 [hereinafter 1991 NAIC RESOURCES REP.]. In 1992, the Alaska Division of Insurance collected over \$26 million in insurance premium taxes. ALASKA DEP'T OF COM. AND ECON. DEV., DIV. OF INS., 55TH ANNUAL REPORT 1 (1993).

26. 1991 NAIC RESOURCES REP., *supra* note 25, at 24-25.

27. MEHR ET AL., *supra* note 2, at 763.

28. See Linda Lamel, *State Regulation of the Insurance Industry*, INS. L.J. 336 (1978). In her introduction, Lamel explained:

State regulation of insurance did not begin as regulation of insurance *per se*. As the United States moved into its own national development, the corporate charters issued in Europe disappeared and a United States system for chartering and licensing corporations emerged. New York was the first to enact legislation affecting 'monied corporations,' which required them to file sworn financial statements with the state comptroller.

Id.

29. "While these early reporting requirements were for administrative purposes only, they later provided a useful precedent for obtaining the more extensive information deemed necessary for responsible regulation." DAY, *supra* note 14, at 5.

30. Act of July 5, 1851, ch. 1111, 1851 N.H. LAWS 1072. The basic components of New Hampshire's first law, including procedures for examining and investigating insurers, can be found in most state insurance codes today, including Alaska's.

life insurers to complete an annual questionnaire.³¹ Massachusetts³² and Vermont³³ created insurance commissions in 1852, and Massachusetts created a full-time position for an insurance regulator in 1855.³⁴ The early insurance commissioners initially focused on obtaining financial data in order to monitor the solvency³⁵ of insurers.³⁶ By 1900, thirteen states had separate insurance departments; by 1918, the number had increased to thirty-six.³⁷

The courts have also played a significant role in the development of state insurance regulation. In *Paul v. Virginia*,³⁸ a seminal case regarding insurance regulation, the United States Supreme Court decided that the regulation of insurance contracts fell outside the jurisdiction of the federal government. *Paul* involved a challenge by several New York insurance companies to Virginia's requirement that fire insurance companies purchase and file bonds for the protection of policyholders residing in the state. The Court approved Virginia's regulatory action, holding that the issuance of insurance policies "is not a transaction of commerce" and hence does not fall within the province of the Commerce Clause of the United States Constitution.³⁹

31. Act of Apr. 8, 1851, ch. 95, 1851 N.Y. Laws 167. Today, all states require authorized insurers to post a statutory deposit. *E.g.* ALASKA STAT. § 21.09.090 (1993).

32. Act of May 22, 1852, ch. 311, 1852 Mass. Acts 166.

33. Act of Nov. 23, 1852, ch. 45, 1852 Vt. Laws 46; Act of Nov. 23, 1852, ch. 46, 1852 Vt. Laws 51-52 (state officers appointed *ex-officio* members of Board of Insurance Commissioners).

34. Act of Mar. 31, 1855, ch. 124, 1855 Mass. Acts 569.

35. The issue of insurer solvency has been a driving force behind the continued development of insurance regulation. *See* DAY, *supra* note 14, at 2; *see also* ALASKA STAT. § 21.90.900(21) (1993) (definition of insolvency in insurance context).

36. Lamel, *supra* note 28, at 337. Today, insurance commissioners, and the agencies they lead, wield tremendous policy-making power. One commentator has characterized the California Department of Insurance as a "powerhouse" of the same stature as the Public Utilities Commission and the California Environmental Protection Agency. L. Harold Levinson, *The California Regulatory Law Reporter*, ADMIN. L. NEWS 8, 8-9 (1993).

37. DAY, *supra* note 14, at 10.

38. 75 U.S. (8 Wall.) 168 (1868).

39. *Id.* at 183 (Insurance "policies are simply contracts . . . not articles of commerce.").

In 1871, a few years after the Court's *Paul* decision, New York's Superintendent of Insurance invited insurance commissioners of all states to meet in an effort to achieve uniformity in annual statements, examination practices and laws.⁴⁰ The meeting resulted in the formation of the National Convention of Insurance Commissioners, which in 1936 became the National Association of Insurance Commissioners ("NAIC").⁴¹ Since its inception, this organization has played an increasingly important role in providing a forum for the exchange of ideas and formulation of uniform insurance regulation policy.⁴²

40. MEHR ET AL., *supra* note 2, at 723. The annual statement of financial information which insurance companies are required to file in states where they do business, as well as with the NAIC, see *infra* note 41, is a powerful tool for the promotion of uniform regulation of insurers.

41. The NAIC is an association comprised of the chief insurance regulatory officials of the states, U.S. territories and insular possessions. The NAIC has three express regulatory objectives:

- (1) Promotion of the public interest through the regulation of insurance and the fair, just and equitable treatment of insurance consumers and claimants;
- (2) Reliability of the insurance institution as to solvency, financial solidity and guaranty against loss; and
- (3) Maintenance and improvement of State regulation of insurance in a responsive and efficient manner.

See *NAIC Strategic Plan 1993-97, Mission Statement*, NAIC NEWS (Nat'l Ass'n of Ins. Comm'rs, Kansas City, Mo.), July 1993, at 14. Throughout its history, the NAIC has provided valuable national leadership in regulating the insurance industry. See generally *NAIC Model Law Process: Hearings on the Nat'l Ass'n of Ins. Comm'rs Before the Subcomm. on Antitrust, Monopolies, and Business Rights of the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. (1991) (statement of Hon. Earl Pomeroy) [hereinafter *Hearings on NAIC Model Law Process*]. Over the years, the NAIC developed the predecessor to the annual statement blank to provide a means for uniform financial reporting; established the Securities Valuation Office ("SVO") to assist insurers in valuing securities; approved the Uniform Insurers Liquidation Act in response to the forced liquidation and reorganization of insurance companies during the Great Depression; helped draft the McCarran-Ferguson Act; introduced a model Unfair Trade Practices Act, which has since been adopted by all states; and more recently has pressed Congress to address white collar insurance fraud and lobbied for a national program of financial regulation standards.

42. The NAIC has developed more than 200 model laws to meet the needs of state regulators. *Hearings Before the Subcomm. on Oversight and Investigations of the House of Representatives Comm. on Energy and Com.* 102d Cong., 1st Sess. 44 (1991) (statement of Richard L. Fogel) [hereinafter *Hearings*]; MODEL LAWS, REGULATIONS AND GUIDELINES (Nat'l Ass'n of Ins. Comm'rs 1993) [hereinafter NAIC MODEL LAWS]. When a regulatory need is recognized, the NAIC

For nearly seventy-five years after the NAIC's emergence, state insurance regulatory practices developed without significant interference from the federal government.⁴³ In 1944, however, the Supreme Court reversed its *Paul v. Virginia* position, holding in *United States v. South-Eastern Underwriters Ass'n*⁴⁴ that the business of insurance does impact interstate commerce and, therefore, is subject to federal control under the Commerce Clause and antitrust laws.⁴⁵ Because "[n]o commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause," the Court reasoned that it could not "make an exception of the business of insurance."⁴⁶ This decision raised serious doubts about the power of states to regulate insurance and caused considerable turmoil for both insurance industry members and state regulators.⁴⁷ Seeking to maintain the states' position as the industry's primary regulators, the NAIC and the insurance industry joined forces to obtain a congressional remedy. Their efforts paid off the following year when Congress passed the McCarran-Ferguson Act.

committee or subcommittee with pertinent jurisdiction in the area examines the issue, sometimes assigning this work to a task force or working group. These bodies, comprised of state regulators, research the issue and hold hearings. A draft model is typically left open for comment prior to any vote. Upon a majority vote of the plenary session, a model is adopted by the NAIC. *Hearings on NAIC Model Law Process*, *supra* note 41, at 1.

43. The principle of *Paul v. Virginia*, that the insurance industry was subject to state regulation, was cited and reaffirmed by the Supreme Court no less than twenty-two different times during this period. See *Legislative Proposal Submitted to the Congress of the United States by the Executive Committee of the National Association of Insurance Commissioners*, NAIC PROC. (Nat'l Ass'n of Ins. Comm'rs, Kansas City, Mo.), August 29, 1944, at 44 [hereinafter *NAIC Legislative Proposal*].

44. 322 U.S. 533 (1944).

45. *Id.* at 552-53.

46. *Id.* at 553.

47. ARTHUR ANDERSEN & CO., *supra* note 4, at 34. See also *Report of the Subcommittee on Federal Legislation to Executive Committee of National Association of Insurance Commissioners*, NAIC PROC. (Nat'l Ass'n of Ins. Comm'rs, Kansas City, Mo.), August 29, 1944, at 43. It is interesting to note that this subcommittee was appointed on October 7, 1943, prior to *South-Eastern Underwriters*. See *supra* text accompanying note 44.

III. THE MCCARRAN-FERGUSON ACT AND THE THREAT OF FEDERAL REGULATION

Enacted in 1945, the McCarran-Ferguson Act expressly declares that "continued regulation and taxation by the several states of the business of insurance is in the public interest,"⁴⁸ thereby reaffirming the states' long-standing right to tax insurers and regulate in this area. Despite the Act's apparent simplicity and brevity, the intended meaning of the words "business of insurance" contained in the Act has been a fertile source of litigation and scholarly comment.⁴⁹ The McCarran-Ferguson Act also contains language exempting insurance companies from antitrust laws, excluding "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."⁵⁰ Recent attempts to repeal or modify the McCarran-Ferguson Act, including a bill introduced

48. 15 U.S.C. § 1011 (1988).

49. See generally Davis Howard, *Uncle Sam Versus the Insurance Commissioners: A Multi-Level Approach to Defining the "Business of Insurance" Under the McCarran-Ferguson Act*, 25 WILLAMETTE L. REV. 1 (1989); Eric P. Gillett, Comment, *The Business of Insurance: Exemption, Exemption, Who Has the Antitrust Exemption?*, 17 PAC. L.J. 261 (1985); *Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205 (1979) (establishing a legal test for "business of insurance"). Recently, the United States Supreme Court held that the process of liquidating an insurer constitutes the business of insurance. See *United States Dep't of Treasury v. Fabe*, 113 S.Ct. 2202 (1993) (recognizing the superiority of insurance policyholder interests over the interests of the federal government in the liquidation of an insolvent insurer).

It has been argued that Supreme Court decisions have emasculated the Act's original intent by interpreting the phrase "business of insurance" in an unreasonably constrictive manner. See Spencer L. Kimball & Barbara P. Heaney, *Emasculation of the McCarran-Ferguson Act: A Study in Judicial Activism*, 1985 UTAH L. REV. 1, 58.

50. See 15 U.S.C. § 1013(b) (1988).

this year,⁵¹ have frequently focused on the perceived inequity in exempting insurance companies from antitrust laws.

Of the many cases interpreting the McCarran-Ferguson Act, a recent one is particularly noteworthy. In June 1993, the United States Supreme Court decided *Hartford Fire Insurance Co. v. California*,⁵² a case in which nineteen states, including Alaska, and fourteen private parties brought an antitrust action against thirty-two defendants, primarily domestic and foreign insurers and reinsurers, alleging that the defendants colluded in violation of the law. The plaintiffs alleged that the defendants had engaged in various conspiracies aimed at forcing some primary insurers to change the terms of their standard domestic commercial general liability ("CGL")⁵³ policies to conform to language in policies the defendant insurers wanted to sell. The district court concluded that the defendants were entitled to immunity under the antitrust exemption contained in the McCarran-Ferguson Act and granted the defendants' motion to dismiss.⁵⁴

The court of appeals reversed, finding that (1) the foreign reinsurers did not fall within the antitrust exemption because their activities could not be "regulated by State law" within the meaning of the McCarran-Ferguson Act and (2) the domestic insurers had forfeited their exemption by conspiring with the non-

51. See Insurance Competitive Pricing Act of 1993, H.R. 9, 103d Cong., 1st Sess. (1993). Repeal of the antitrust exemption has long been sought by critics of the insurance industry. During the past three sessions of Congress, Representative Jack Brooks, chair of the House Judiciary Committee, has introduced legislation to modify the antitrust exemption. See *id.*; see also H.R. 1663, 101st Cong., 2d Sess. (1990). Senator Metzenbaum has introduced a similar bill in the past. See S. 430, 102d Cong., 1st Sess. (1991). See generally Charles D. Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587; Note, *McCarran-Ferguson Immunity*, 105 HARV. L. REV. 1414 (1992).

52. 113 S.Ct. 2891 (1993).

53. General liability insurance indemnifies businesses against third-party claims for bodily injury or property damage. Most general liability insurance is written on standardized CGL advisory policy forms developed by Insurance Services Office, Inc. ("ISO"). ISO develops forms that comply with state requirements and files them with the respective state insurance departments. See *infra* note 103. ISO is a defendant in the *Hartford Fire* case, and activities surrounding adoption of its CGL forms are the focus of the case.

54. *Hartford Fire Ins.*, 113 S.Ct. at 2899-2900.

exempt foreign reinsurers.⁵⁵ The court of appeals also held that the defendants' conduct amounted to acts of "boycott, coercion, or intimidation" and therefore fell outside the antitrust exemption.⁵⁶ In remanding the case after affirming and reversing in part, the United States Supreme Court held that although the domestic insurers did not lose their antitrust immunity by conspiring with foreign reinsurers, the allegations of boycott were nevertheless sufficient to defeat the motion to dismiss.⁵⁷

Due to its potential for subjecting insurers to antitrust liability, the *Hartford Fire Insurance* case has been characterized as "a nuclear attack on the insurance industry."⁵⁸ The Supreme Court, in remanding the suit for reconsideration of the boycott allegations, has made it easier for plaintiffs to bring to trial an antitrust action against an insurer based on allegations of boycott. The Court's decision should therefore bolster the cause of those seeking repeal of the insurance industry's antitrust exemption.

Aside from its concerns over the antitrust exemption, Congress's attention has recently focused on the alarming increase in insurer insolvencies. In the years 1974-1980, an average of 6.9 insurers were liquidated each year, while the period 1981-1987 saw that number nearly double to an average of 12.6 per year.⁵⁹ Over

55. *Id.* at 2900 (quoting *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991)).

56. *Id.*

57. *Id.* at 2903, 2916.

58. See Richard Carelli, *Supreme Court Clears Way for Giant Insurance Lawsuit*, ANCHORAGE DAILY NEWS, June 29, 1993, at C2. See also Judy Greenwald, *Insurers See Victory in Antitrust Ruling*, BUS. INS., July 5, 1993, at 1.

59. See U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON COMMERCE, CONSUMER PROTECTION AND COMPETITIVENESS, OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE, INSURANCE REGULATION: PROBLEMS IN THE STATE MONITORING OF PROPERTY/CASUALTY INSURER SOLVENCY 9 (1989). The threat of insurer insolvencies has long been a concern. The Great Chicago Fire of 1871 resulted in 68 insurers going broke under the weight of more than \$100 million in claims. The San Francisco Earthquake and Fire of 1906 resulted in over \$500 million in losses with 12 American insurers going out of business. Some foreign insurers simply refused to pay claims. D. MUSCATINE, OLD SAN FRANCISCO 430, 435 (1975).

More recently, estimated insured losses for Hurricane Andrew in 1992 are nearly \$23 billion, and Andrew has thus far resulted in eight insurer insolvencies. *Andrew claims another victim*, BUS. INS., Mar. 8, 1993, at 70; *1992 cat loss total soars with Andrew figures*, BUS. INS., Mar. 1, 1993, at 2; F. Bayles, *Insurance industry put on storm alert*, ANCHORAGE DAILY NEWS, May 30, 1993, at G6.

150 property-casualty companies became insolvent from 1969 to 1989, with nearly half of these insolvencies occurring between 1984-1989.⁶⁰ A congressional report arising from an extensive investigation into the causes of insurance company failures is highly critical of both the industry and its state regulators.⁶¹ Consequently, the federal government is considering expanding its role in regulating insurance, thereby raising questions regarding whether the McCarran-Ferguson Act should be repealed, amended or left undisturbed, and whether other remedial legislation should replace it.

Congressman John Dingell recently introduced a bill to substantially increase federal oversight over the problem of insurer insolvency.⁶² The Federal Insurance Solvency Act of 1993⁶³

Insurer insolvencies tend to follow catastrophic events. Notably, from 1987 to 1993 the insurance industry faced more losses resulting from catastrophes than during the previous 20 years. G. Souter, *Alternative market reacts to change*, BUS. INS., June 7, 1993, at 42.

60. SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COM., *FAILED PROMISES: REPORT ON INSURANCE COMPANY INSOLVENCIES 2* (1990) [hereinafter *FAILED PROMISES*]. Congressman John Dingell chaired the committee conducting the investigation.

61. The report describes certain individuals and activities in the insurance industry as "scandalous management and rascality," "pirates and dolts," "scandalous behavior," "financial knaves and buccaneers" and "crooks, scoundrels and incompetents." *Id.* at iii, 2-3.

62. Insurer insolvencies probably constitute the greatest threat to continued state regulation, and congressional concern with the states' authority in this area has long been a topic of consideration. In 1866 and 1868, prior to *Paul v. Virginia*, bills were introduced in Congress to create a national bureau of insurance within the Treasury Department. H.R. 738, 39th Cong., 1st Sess. (1866); S. 299, 40th Cong., 2d Sess. (1868). Neither bill was enacted, and an 1892 bill to create a federal commissioner of insurance also failed. H.R. 9629, 52d Cong., 1st Sess. (1892). Even President Theodore Roosevelt twice suggested that Congress consider regulating insurance. In declining to do so, Congress deferred to the Supreme Court, accepting its *Paul* decision as the law of the land. See generally *Report of Subcommittee on Federal Legislation to Executive Committee of National Association of Insurance Commissioners*, NAIC PROC. (Nat'l Ass'n of Ins. Comm'rs, Kansas City, Mo.), August 29, 1944, at 41. Turn-of-the-century legal treatises joined the vigorous debate concerning federal regulation of insurance. See, e.g., Carmen F. Randolph, *Federal Supervision of Insurance*, 5 COLUM. L. REV. 500 (1905); I.M. Earle, *Can Congress Regulate the Business of Insurance?*, 62 CENT. L.J. 28 (1906); John W. Walsh, *National Supervision of Insurance and Paul v. Virginia*, 38 AM. L. REV. 181 (1904). Unsuccessful resolutions to amend the Constitution in order to allow federal control over this area were introduced in 1914, 1915 and 1933. S.J. Res. 103, 63d Cong., 2d Sess. (1914); H.R.J. Res. 194,

would create a joint system of federal/state regulation that would enable insurers of any size to forego state regulation in favor of seeking a federal solvency certificate issued by a newly-created Federal Insurance Solvency Commission ("FISC"). Among other things, the FISC would regulate the solvency and financial condition of all federally licensed insurers and reinsurers and develop rehabilitation and liquidation procedures for them; establish a national guaranty fund; and create a federal entity to regulate and license producers who do business in more than one state. This bill, however, has been criticized as costly and inefficient,⁶⁴ and many parties are wary of greater federal involvement due to the federal government's poor record in protecting the public in other areas of financial services, such as the banking and junk bond industries.⁶⁵

63d Cong., 2d Sess. (1914); S.J. Res. 58, 64th Cong., 1st Sess. (1915); S.J. Res. 51, 73d Cong., 1st Sess. (1933). In 1958, Professor Kimball questioned "whether state regulatory power over the insurance business is likely to continue, or whether insurance will fall increasingly under the aegis of the federal government." Spencer L. Kimball and Ronald N. Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545, 545 (1958). In 1969, another observer of insurance regulation referred to the state of affairs as a "time of trial for state regulation of insurance, with the persistent threat of federal takeover." Werner Pfennigstorf, *The Enforcement of Insurance Laws*, 1969 WIS. L. REV. 1026, 1027. Senator Howard Metzenbaum introduced a bill in 1991, which never reached the floor of Congress for a vote, that would have created a federal agency with broad powers to regulate insurance. S. 1644, 102d Cong., 1st Sess. (1991) (re-introduced during the 1993 session). Federal regulation of insurance has therefore been a constant subject of legislation and further attempts to expand federal regulation of insurance are likely.

63. H.R. 1290, 103d Cong., 1st Sess. (1993).

64. See ALLIANCE OF AMERICAN INSURERS, BULLETIN NO. 92-11 (1992); Marian Freedman, *Two-Tier Regulation: Fueling the Fire*, BEST'S REVIEW, June 1992, at 26. The 1993 President of the NAIC, testifying recently before Congressman Dingell's committee, stated that "[t]his bill would require states still to spend money to regulate those insurers that choose not to be federally certified while the federal government spent additional billions. By any calculation or measure, it is clear that H.R. 1290 would cost the American taxpayer a mint while not saving one penny." Stephen T. Foster, *NAIC chief blasts dual regulation*, BUS. INS., May 3, 1993, at 45. But see *Subcommittee on Consumer Credit and Insurance Holds Two-Day Hearing on H.R. 1257*, NAIC NEWS (Nat'l Ass'n of Ins. Comm'rs, Kansas City, Mo.), Apr. 1993, at 6.

65. Another proposed solution to the insolvency dilemma is the use of interstate compacts. See generally Robert H. Myers, *Can Interstate Compacts Solve the Insurance Regulation Debate?*, RISK MGMT., August 1993, at 52. Aspects of the insurance industry believed to be suitable for regulation through such compacts

Passage of the Federal Insurance Solvency Act seems doubtful in light of the "turf wars" between various members of Congress,⁶⁶ as well as the continued pressure against the bill exerted by insurance industry lobbyists.⁶⁷ While a century ago the insurance industry favored federal regulation,⁶⁸ today, with few exceptions, it supports the NAIC's position of continued state regulation.⁶⁹

State regulators and industry members fear that repeal of the McCarran-Ferguson antitrust exemption or the enactment of the Federal Insurance Solvency Act will lead to increased federal preemption, but, in reality, the federal government has been chipping away at state regulation for many years. It has done so by creating its own insurance entities in several areas, such as the

include agent licensing, liquidation and rehabilitation proceedings, solvency and regulation of alien insurers.

66. Representatives John Dingell (Chairman, House Energy and Commerce Committee) and Henry Gonzalez (Chairman, House Banking, Finance and Urban Affairs Committee) have been locked in a fierce and often public battle to determine which committee will have responsibility for overseeing insurance. In 1993, both committees considered bills that would create a major federal role in insurance regulation. See Steven Brostoff, *Crossfire in Congress Hits Insurers*, NAT'L UNDERWRITER, April 5, 1993, at 1.

67. Well-known insurance industry groups include the Alliance of American Insurers ("AAI"), the Insurance Information Institute ("III"), the American Council of Life Insurance ("ACLI"), the Health Insurance Association of America ("HIAA") and the National Association of Independent Insurance Agents & Brokers ("NAIAB"). The largest insurance trade association in Alaska is the Alaska Independent Insurance Agents and Brokers ("AIIAB").

68. After the Civil War and through the first decade of this century, leading insurance executives advocated the federalization of supervision, taxation and chartering of insurers. H. Clay Johnson, *Insurance Regulation at the Crossroads*, 648 INS. L.J. 7, 10 (1977). The landmark case of *Paul v. Virginia*, see *supra* text accompanying note 38, was actually brought by insurance interests as a test case in an effort to make the Commerce Clause a bar to state regulation and taxation. See DAY, *supra* note 14, at 14-15.

69. Johnson, *supra* note 68, at 9-10. State regulation may be jeopardized, however, should Executive Life, the country's second largest insolvency, result in liquidation, which at this point appears possible. See Cynthia J. Borrelli, *Public Regulation of Insurance Law: Recent Developments*, 27 TORT & INS. L.J. 418, 418 n.4 (1992). Alaska employee retirement benefits, including \$134 million in guaranteed investment contracts ("GICs"), were heavily invested in Executive Life. The nation's largest insurer insolvency to date involved Mutual Benefit Life Insurance Company, a nine billion dollar entity. Thus far, the efforts of other insurers have saved Mutual Benefit Life from liquidation.

Federal Deposit Insurance Corporation for banks and thrifts,⁷⁰ by participating with the insurance industry in making insurance available⁷¹ and by overt regulation.⁷² Further legislation impacting health insurance seems likely under the Clinton Administration.⁷³

State regulation of the business of insurance is presently under the congressional microscope, and "there [has] never been as serious an effort [to create a federal role in regulating insurance] as those initiated during the 102d Congress."⁷⁴ While the NAIC warns that increased federal regulation would destroy jobs, thereby harming local and state economies, and ultimately increase insurance costs to consumers,⁷⁵ if states ultimately fail to protect insurance consumers, Congress will continue to seek a greater role in this important area.

IV. INSURANCE REGULATION IN ALASKA

A. Territorial Days (1867 to 1959)

Alaska's territorial legislature passed its first law regulating insurance in 1915.⁷⁶ Initially, the regulatory role of the state was

70. 12 U.S.C. §§ 1811-1832 (1988). The Federal Crop Insurance Program is another example of the federal government creating a federal entity to enter the business of insurance. See 7 U.S.C. §§ 1501-1520.

71. In the Product Liability Risk Retention Act of 1981, Congress established retention and purchasing groups in response to the increasing unavailability of product liability insurance. See 15 U.S.C. §§ 3901-3906. In addition, the Employee Retirement Income Security Act of 1974 ("ERISA") created significant federal oversight of group health insurance. See 29 U.S.C. §§ 1001-1461. Due to recent catastrophic storms, including the summer 1993 flooding in the Midwest, the National Flood Insurance Program has received increasing attention. See 42 U.S.C. §§ 4001-4128 (1988 & Supp. 1991). In 1975, the plan had 540,000 policies covering potential losses of \$13 billion. Today, there are 2.6 million policies with a total risk of \$229 billion. See Fred Bayles, *Insurance Industry Put on Storm Alert*, ANCHORAGE DAILY NEWS, May 30, 1993, at G6.

72. See 42 U.S.C. §§ 1395-1395ccc (1988 & Supp. 1991) (Medicare).

73. The national stakes involve an estimated 460,000 jobs and \$280 billion in annual premiums for approximately 1500 health insurers. See, e.g., *Why Insurers Just Say No*, ALASKA HOSP. AND NURSING HOMES, Feb. 1993, at 2. It is likely that Clinton's plan will impact health insurance provided through workers' compensation and automobile insurance.

74. NATIONAL ASS'N OF INS. COMM'RS, 1993 ISSUES 50.

75. See *id.*

76. As a young state, Alaska has had the benefit of drawing upon legislation which evolved through the hard work of other states.

a passive one; Alaska merely required that insurers annually file financial statements⁷⁷ and "certificates of qualification" stating that the entity or person was "qualified to carry on the business of insurance in [Alaska] in accordance with the laws thereof."⁷⁸ The 1915 legislature also required that persons or entities involved in selling insurance obtain licenses from the Territorial Treasurer, and pay a one percent tax on all premiums contracted for or collected.⁷⁹ These initial requirements, though modified over the years, can be found in Alaska's present insurance code.

Insurance regulation soon evolved beyond receiving data and collecting premium taxes, however, and in 1937 Alaska significantly changed its insurance laws with the enactment of its first true insurance code.⁸⁰ The 1937 law established the Territorial Auditor as "Ex-officio Insurance Commissioner" and charged him with executing the insurance laws⁸¹ and submitting annual reports to the legislature and governor containing data on all authorized insurance companies, receipts and disbursements of the insurance commissioner, and proposed amendments to the insurance code.⁸²

The 1937 law granted broad powers to the commissioner, including the right to examine the books and records of any insurance company or agent who the commissioner reasonably believed to be violating the insurance laws.⁸³ The commissioner

77. Act of Apr. 29, 1915, ch. 57, 1915 Alaska Sess. Laws 107-08. *See also* Act of May 5, 1921, ch. 43, 1921 Alaska Sess. Laws 139-40.

78. 1915 Alaska Sess. Laws 105-06.

79. *Id.* at 108. The tax was raised to 2% in 1921. 1921 Alaska Sess. Laws 140. Today, the tax is 2.7%. ALASKA STAT. § 21.09.210(b)(1) (1993).

80. Act of Mar. 4, 1937, ch. 22, 1937 Alaska Sess. Laws 60-88.

81. *Id.* at 63.

82. *Id.* at 64. Although expanded in scope, the reporting requirement still exists today. Annual reports now provide a variety of baseline data on Alaska's insurance market and the industry's activities. *See* ALASKA STAT. § 21.06.110 (1993).

The first annual report filed by the commissioner in 1939 provides an interesting contrast to current activity by the Division of Insurance. In 1939, the Territory had 82 insurance companies authorized to transact business, 86 licensed insurance agents, 1 licensed insurance broker and \$22,946 in premium taxes paid. REPORT OF INS. COMM'R, TERR. OF ALASKA 3 (1938). By comparison, in fiscal year 1992, there were 1,086 authorized insurers, 2,808 individuals licensed as agents (resident only), 235 individuals licensed as brokers (resident only) and \$26,342,790 in premium taxes collected. ALASKA DEPT OF COM. AND ECON. DEV., DIV. OF INS., 54TH ANNUAL REPORT 1, 3, 18 (1992).

83. *See* 1937 Alaska Sess. Laws 63-64.

also had authority to bring suit to enforce the insurance regulations, and to suspend or revoke a company's certificate of authority if a company was determined to have violated the insurance laws or an order of the commissioner, or if the company was insolvent or in an unsafe financial condition.⁸⁴

The 1937 law also made it easier for insureds to bring suits against insurance companies. The law required an insurer to consent to service of process through the commissioner prior to being issued a certificate of authority (that is, an insurance license).⁸⁵ This requirement was significant because there were no domestic insurers in the Alaska Territory at that time. Foreign insurance companies were also required, at the discretion of the commissioner, to file a bond, not to exceed \$20,000, for the purpose of answering monetary judgments, decrees or orders of the territorial courts.⁸⁶ This requirement was the precursor to the current statutory deposit requirement.⁸⁷

The 1937 law also addressed the licensing of insurance agents and brokers.⁸⁸ All licenses were subject to annual renewal, and the commissioner had broad discretion to grant or deny a license and impose penalties for non-compliance with licensing requirements.⁸⁹ The commissioner could also suspend or revoke a license if, after notice and hearing, he found the agent "guilty of any willful violation of the insurance law."⁹⁰ These prohibitions laid the groundwork for the current licensing scheme for agents and

84. *Id.* at 63-64, 69. The ability to deny, fail to renew or revoke an insurer's license or certificate of authority to do business has been described as the backbone of a commissioner's power. DAY, *supra* note 14, at 10.

85. 1937 Alaska Sess. Laws 65. A certificate could be denied, however, at the commissioner's discretion. *See id.* at 69 (implying that only the revocation and suspension of a certificate already granted requires a hearing). The service of process requirements have remained essentially unchanged. When applying for a certificate of authority today, an insurer must complete separate forms which appoint the director as its agent for service of process in Alaska and designate a person to receive the service from the director. ALASKA STAT. § 21.09.180 (1993).

86. 1937 Alaska Sess. Laws 66.

87. ALASKA STAT. § 21.09.090 (1993).

88. 1937 Alaska Sess. Laws 70-73.

89. *See id.* at 70-72.

90. *Id.* at 72. Prohibited activities included engaging in willful overinsurance, misrepresentation concerning the product, deception or unjust dealing with any person with regard to any insurance policy, as well as willful failure to transmit premiums, misrepresentation in license application materials, offering inducements and rebating. *Id.* at 72-73.

brokers⁹¹ as well as the trade practices legislation⁹² that would develop soon after the passage of the McCarran-Ferguson Act.

The 1937 law also adopted the standard insurance policies of Washington and New York as the standard forms for the Territory.⁹³ Prior to issuing any policy, an insurance company doing business in the Territory was required to obtain the commissioner's approval, which was based on a determination that the policy conformed to the language and style of the standard forms.⁹⁴

On the important issue of liquidating insolvent or financially impaired insurers, the 1937 law granted the commissioner power to revoke an insurer's certificate of authority if it failed to meet the capital requirements. The commissioner could also apply to the court for revocation of the insurer's charter and for the appointment of a receiver to wind up its affairs.⁹⁵ Under the statute, the receiver could not distribute assets until all risks were protected. Alaska's current procedures for liquidating insurers, although significantly expanded, follow similar guidelines.⁹⁶

Alaska's legislature amended the new insurance code in 1939, establishing procedures for licensing non-resident agents and brokers⁹⁷ and providing for sanctions to be imposed on agents and brokers who knowingly place insurance with an insurer who is financially impaired or insolvent.⁹⁸ In addition, all agents and brokers, whether resident or non-resident, were required to keep complete records of their business transactions, subject to inspection by the commissioner.⁹⁹ Successor laws to these record-keeping and inspection provisions are an essential part of regulating licensees today.

In 1947, the legislature enacted Alaska's first rate law for the express purpose of "promot[ing] the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and regulate

91. ALASKA STAT. §§ 21.27.010-.460 (1993).

92. *See id.* §§ 21.36.010-.420.

93. 1937 Alaska Sess. Laws 80.

94. *Id.* at 81. Alaska's current insurance code has greatly expanded these provisions. *See* ALASKA STAT. §§ 21.42.010-.375 (1993).

95. 1937 Alaska Sess. Laws 77-78.

96. *See* ALASKA STAT. §§ 21.78.010-.330 (1993).

97. Act of Mar. 9, 1939, ch. 66, 1939 Alaska Sess. Laws 157-59.

98. *Id.* at 162. Violators were subject to a fine of not less than \$50 and not more than \$250 as well as the revocation of their licenses. *Id.*

99. *Id.* at 159-60.

cooperative action among insurers in rate making and in other matters within the scope of th[e] Act.”¹⁰⁰ The correlative chapter of the current insurance code contains a nearly identical statement of purpose and is similar in many substantive respects.¹⁰¹

Consistent with the antitrust exemption, the rate law gave fire and casualty insurers¹⁰² the freedom to collaborate regarding rates, typically as members of rating organizations or bureaus,¹⁰³

100. Act of Mar. 14, 1947, ch. 58, 1947 Alaska Sess. Laws 138. Modern commentators have offered the following explanation of rate laws:

The business of insurance is so far affected with a public interest as to justify legislative regulation of its rates. The policy of a state in regulating insurance rates is to establish rates that are neither excessive nor inadequate and to encourage cooperation in the rate-making, while at the same time permitting reasonable compensation, neither prohibiting nor encouraging rate uniformity. There is a clear legislative intent to regulate the insurance business in such a manner as to protect the public insofar as it is possible by providing insurance premiums low enough to maintain competition and to prevent unreasonable profits and yet high enough to enable the insurers to provide the protection necessary to meet the claims against their insureds and requirements of the insuring public.

19 JOHN A. APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 10491 (1982).

101. See ALASKA STAT. § 21.39.010 (1993).

102. In Alaska, as is true in the vast majority of states, insurance rates for most reinsurance, disability (health) insurance and marine insurance are not regulated. *Id.* § 21.39.020(b).

103. Rating organizations or bureaus collect statistics to develop rates and rate schedules for approved policy forms. They must be licensed and are closely regulated to assure consumers fair and non-discriminatory prices. See generally *id.* § 21.39.060. A “bureau” state is one in which a rating organization has been licensed and typically has also been designated as the statistical agency for a line or lines of insurance. The status is generally exclusive, and the rating organization commonly files rates, forms and rules on behalf of all insurers selling the respective line(s). Rate flexibility is still available, and the insurance code provides for deviations from the filed rates. *Id.* § 21.39.070. Alaska is a “bureau” state for workers’ compensation. The National Council on Compensation Insurance (“NCCI”), the largest national rating organization for workers’ compensation insurance, is the designated rating agency in Alaska.

The preeminent as well as largest rating organization for property/casualty lines, Insurance Services Office (“ISO”), was formed in 1971 through the consolidation of six national insurance rating or service organizations. ISO is an insurer-supported, national, non-profit corporation that meets various needs of property/casualty insurers in the United States. Its participants include 1400 domestic property and casualty insurers, and it is licensed in all 50 states. *INSURANCE SERV. OFFICES, INC., ISO PRODUCTS AND SERVICES* 1 (1987). ISO has expanded its operations beyond merely setting rates. Among other things, it provides actuarial services, develops advisory rules and insurance policy language,

subject to regulatory oversight for fairness. The law also required that an insurer, or a licensed rating organization, file certain required data with the insurance commissioner to support its rates. While most state insurance regulatory agencies cannot set rates, as they merely have the power to approve, disapprove or set them aside,¹⁰⁴ rate laws nevertheless provide insurance commissioners with one of their strongest means of affecting public policy¹⁰⁵—the discretion to control insurance premium rates for consumers.¹⁰⁶

In 1955, another pivotal year for Alaskan insurance regulation, the legislature established the Alaska Insurance Commission as the agency to oversee insurance regulation.¹⁰⁷ The 1955 Act also created an independent commissioner of insurance to be appointed

develops and distributes manuals containing the advisory rating information, and acts as a statistician. INSURANCE SERV. OFFICES, INC., PROFILE: INSURANCE SERVICES OFFICE 1, 3 (1987). ISO recently began publishing and filing advisory loss costs, upon which a portion of a rate is based, in an effort to avoid perceived antitrust problems. *See generally* ALASKA ADMIN. CODE tit. 3, §§ 29.200-.300 (July 1993).

104. Alaska is a "prior approval" state, meaning that any rate, rule, or form must be approved before it may be used in this state. ALASKA DEP'T OF COM. AND ECON. DEV., DIV. OF INS., BULLETIN 93-03 2 (1993).

105. While the definition of the term "public policy" is not one upon which political scientists have reached consensus, it nonetheless always refers to actions of government and the intentions that determine those actions. *See* C. COCHRAN, AMERICAN PUBLIC POLICY: AN INTRODUCTION 2 (3d ed. 1990). *See also* Manning v. Alaska R.R. Corp., 853 P.2d 1120, 1123 (Alaska 1993) ("[A] governmental authority functions as a administrative agency when it formulates general policy or when it applies such policy to particular persons in their individual capacities." (citing Winegardner v. Greater Anchorage Area Borough, 534 P.2d 541, 544 (Alaska 1975))). Insurance regulation is fraught with public policy considerations. *See generally* KIMBALL, *supra* note 22.

106. *See generally* APPLEMAN & APPLEMAN, *supra* note 100, § 10491. Predictably, rate regulation is sometimes criticized as being politically motivated, particularly when exercised by elected insurance commissioners. MEHR ET AL., *supra* note 2, at 696-97.

107. Act of Mar. 3, 1955, ch. 18, 1955 Alaska Sess. Laws 62-64. The commission consisted of five members appointed by the governor, with members serving staggered five year terms. In addition to a residency requirement, the commission required that "(1) two members . . . be selected from persons regularly engaged as agents or brokers of fire or casualty insurance; (2) one member . . . [be] selected from persons who are life insurance agents or brokers; and (3) two members . . . [be] selected to represent the public and shall have no direct or indirect interest in any insurance business or company, but may be policy holders." *Id.* § 7 at 63.

by, and serve at the pleasure of, the Commission.¹⁰⁸ The commissioner, "selected on the basis of his knowledge of [the] insurance business,"¹⁰⁹ was charged with "supervis[ing] the conduct of all business relating to insurance companies and societies, domestic and foreign, to the extent authorized or directed by law."¹¹⁰

Even with the establishment of the Insurance Commission and the position of commissioner, by 1959 there were few actual regulators in Alaska. The legislature allocated to the Insurance Department only \$1900 for personnel salaries.¹¹¹ Nevertheless, the territorial legislature considered insurance regulation an important issue, as evidenced by the 1957 revision of the insurance code to address requirements for authorizing insurers and surplus lines insurers, capital and surplus limits, licensing, and unfair trade practices.¹¹² The premium tax was also raised to three percent,¹¹³ thereby substantially increasing tax revenues.¹¹⁴

B. Regulation Since Statehood (1959 to present)

Insurance regulation activity since statehood has mirrored Alaska's growth. Alaska was the second-fastest growing state in the nation in the 1980's, with its population increasing 31.1 percent from 1980 to 1989. However, the last seven years reflect a disproportionate increase in insurance activity that cannot be attributed solely to population increases. The following table¹¹⁵ indicates this change in population, along with the increase in the activities of the Division of Insurance:

108. *Id.* §§ 3-4 at 63.

109. *Id.* § 4 at 63.

110. *Id.* § 5(3) at 63.

111. Act of Mar. 20, 1957, ch. 72, 1957 Alaska Sess. Laws 85.

112. Act of Apr. 8, 1957, ch. 173, 1957 Alaska Sess. Laws 376-403.

113. Act of Apr. 6, 1957, ch. 185, 1957 Alaska Sess. Laws 451.

114. See ALASKA DEP'T OF COM., 1960 REP. OF DIV. OF INS. 1.

115. Statistics derived from ALASKA DEP'T OF COM., REP. OF DIV. OF INS. (1960, 1985, 1992).

	<u>1960</u>	<u>1985</u>	<u>1992</u>
Population	226,000	533,000	590,000
Admitted insurers	303	971	1,086
Premium receipts	\$197 m	\$829 m	\$1.2 b
Premium taxes	\$857,211	\$17.5 m	\$26.3 m
Licenses issued	645	2,915	6,155
Annual Budget	\$42,400	\$1.0 m	\$2.5 m
Employees	4	19	51

*m=million; b=billion

The growth of the Division of Insurance since the time of statehood can be attributed in large part to adequate funding as well as the legislature's enactment of laws conferring upon it greater responsibility for regulating insurance.¹¹⁶ Adequate funding is vital to effective state insurance regulation,¹¹⁷ and the states most often cited for the quality of their insurance regulatory agencies are those with the most resources.¹¹⁸ The Division is

116. The Alaska Division of Insurance had a budget of approximately \$3.4 million for 1993, ranking it 33rd out of the 55 members of the NAIC. 1991 NAIC RESOURCES REP., *supra* note 25, at 21. Alaska's insurance regulators have not always been so fortunate. In 1955, the commissioner complained of the mere \$18,000 in funding that the Division received for a two-year period, asserting that, with a staff of only one full-time employee, the office faced a great burden in monitoring the activities of hundreds of insurers and licensees, and collecting taxes and fees exceeding \$780,000. REPORT OF INS. COMM'R, TERR. OF ALASKA 5-6 (1955).

117. See, e.g., DAY, *supra* note 14, at 13; Meg Fletcher, *Money, Staff Add Up to Superior Insurance Regulation*, BUS. INS., Dec. 7, 1992, at 3. See also CONSUMER INS. INTEREST GROUP, THE ADEQUACY OF RESOURCES AVAILABLE TO STATE INSURANCE DEPARTMENTS 10-11 (1992); *Don't Ignore State Regulation*, BUS. INS., Dec. 7, 1992, at 8 ("To hope for better funding for insurance departments is probably wishful thinking. However, state legislators must be told that effective regulation requires adequate personnel and systems, both of which cost money.").

Under-funding of state insurance regulation has been a serious concern of the NAIC. Due to the increased number of insurer insolvencies and the NAIC's accreditation program, however, insurance department budgets have increased at an average rate of more than three and a half times the pace of inflation between 1987 and 1993. ROBERT B. KLEIN & JULIENNE L. FRITZ, NATIONAL ASS'N OF INS. COMM'RS, SPECIAL RESEARCH REPORT: RECENT TRENDS IN STATE INSURANCE DEPARTMENT RESOURCES AND ACTIVITIES 3 (1993).

118. E.g., California (\$92.7 million), Florida (\$47.6 million), Illinois (\$16.8 million), New York (\$62.8 million). 1991 NAIC RESOURCES REP., *supra* note 25,

one of the few state agencies to consistently grow over the last few years, and it maintained that growth through the recession in Alaska during the mid to late 1980's.

In 1959, the legislature abolished the Alaska Insurance Commission and the office of Commissioner of Insurance, replacing them with a Director of Insurance, appointed by the governor¹¹⁹ and housed within the newly created Department of Commerce.¹²⁰ While some states allow their chief insurance regulators to perform more than one function, Alaska's director is appointed solely to oversee insurance regulation, thus reducing the likelihood of any conflicts of interest.

By 1960, piecemeal adoption of Alaska's insurance laws had resulted in a code containing much confusion and ambiguity. Developments in insurance over the preceding years had rendered some existing regulatory theories obsolete, and statehood brought an ever-expanding insurance market, as new domestic companies organized and foreign insurers opened local branch offices. Consequently, the Director requested the administration and legislature to authorize and prepare a comprehensive, up-to-date insurance code.¹²¹

After some intervening legislative activity, a bill passed in 1966, resulting in a major revision of the insurance code.¹²² Drafted by Joseph Loonan, a former Alaska Insurance Director (1962-1964), the bill received the general support of trade associations and major national insurance companies.¹²³ Seeking to pass a law "represent[ing] the best grouping of law from other states," the legislature borrowed language from NAIC model laws as well as laws in Montana, Idaho and Washington.¹²⁴

at 21.

119. Approximately 75% of NAIC members choose their chief insurance regulatory officer through gubernatorial appointment. *Id.* at 3.

120. Act of Apr. 3, 1959, ch. 64, 1959 Alaska Sess. Laws 51-52.

121. ALASKA DEP'T OF COM., REP. OF THE DIV. OF INS. 1 (1960).

122. *See* HOUSE COM. COMM. OF ALASKA, ALASKA INS. CODE, H.R. JOURNAL NO. 12, at 19-43 (Mar. 3, 1966) [hereinafter H.R. JOURNAL NO. 12].

123. The representative of the Alaska Association of Insurance Agents, Inc., generally spoke in support of the bill, although he did criticize it as tending to repel rather than induce insurers to open domestic offices in Alaska. *Id.* at 34.

124. *Id.* at 20. Changes to chapter 21 of the insurance code, dealing with investments by domestic insurers, were described by industry representatives as making "Alaska the easiest state in which to do business." *Id.* at 27. Whether that was true, the fact remains that the 1966 revision was a conscious effort to

The 1966 revision brought significant changes to Alaska's insurance regulatory structure. The new Division of Insurance was placed within the reorganized Department of Commerce and Economic Development.¹²⁵ While the legislative history reflects discussions concerning whether the state should have returned to the use of a commissioner, the legislature eventually decided to stay with a "strong director."¹²⁶ The legislature vested the power to appoint the director in the commissioner of the Department of Commerce and Economic Development,¹²⁷ and mandated that the director "serve[] at the pleasure of the commissioner."¹²⁸ Today,

attract insurers to Alaska, and it was largely successful. In the year preceding the effective date of the 1966 revision, there were 402 authorized insurers and 856 licensed individuals. Three years later there were 500 authorized insurers and 967 licensees. ALASKA DEP'T OF COM., DIV. OF INS., 1966 ALASKA INS. REP. 4; ALASKA DEP'T OF COM. AND ECON. DEV., DIV. OF INS., 1969 ALASKA INS. REP. 4.

125. ALASKA STAT. §§ 21.06.020, 44.33.010 (1993); Act of Apr. 26, 1960, ch. 187, 1960 Alaska Sess. Laws 308.

126. See H.R. JOURNAL NO. 12, *supra* note 122, at 20-22. Over the years, the tendency of the Alaska legislature has been to add to rather than subtract from the director's functions and authority.

127. As a practical matter, the governor can be expected to have some input in the appointment of a director or the decision to terminate him.

128. ALASKA STAT. § 21.06.010 (1993). Although some fiercely argue for an elected chief regulatory officer, appointment makes better sense for several reasons. See generally *Don't ignore state regulation*, BUS. INS., Dec. 7, 1992, at 8. First, a well-funded, but otherwise unqualified, person could get elected, which could be disastrous in such an extremely complex industry. An insurance industry insider who was elected as director could use the position to further industry interests at the expense of Alaska insurance consumers. Also, vigorous enforcement of the insurance code may not be politically expedient for an elected director faced with disciplining a wealthy, influential and popular licensee. Allowing the chief regulatory officer to be elected opens the door to the possibility of abuses attendant to the power of incumbency, such as entrenched bureaucracy and a reluctance to try new approaches. Appointed individuals may be less susceptible to political pressure, as they need not worry about the impact their decisions could have on their chances for re-election. These concerns, if realized, would be contrary to the insurance code's overriding goal of protecting consumers.

With insurance regulation having evolved to its present status, the mistaken appointment of an unqualified individual would be disastrous for the Alaska Division of Insurance. In this highly regulated industry which is so vital to the public interest, the commissioner of the Department of Commerce and Economic Development should appoint a person who has a good understanding of insurance, hopefully gained through some experience with the industry, as well as sufficient administrative skills with which to supervise and coordinate the efforts of over 50 individuals. Making a correct appointment is the best protection against abuse.

the powers of Alaska's director of insurance, like powers granted directors and commissioners elsewhere, are complex and far-reaching.¹²⁹

The 1966 law also significantly increased the statutory security requirement for insurers. Recognizing the inadequacy of the \$20,000 maximum bond from 1937,¹³⁰ the legislature raised the requirement for insurers to \$300,000.¹³¹

The most important aspect of the 1966 revision, however, was that it provided Alaska with a comprehensive and coherent insurance code,¹³² greatly improving upon typical insurance codes, which one commentator described as "a rubbish heap without parallel in the law-making of modern man . . . the deciphering of which would tax the genius that was spent in reconstructing classical Roman law from the interpolations of the Justinian compilations."¹³³ While a few of the code's thirty-nine chapters are difficult to understand,¹³⁴ over the years the Alaska legislature

See Andrew F. Giffen, *Comments on the Bases and Limitations of the Regulatory Powers of Insurance Commissioners*, 13 FORUM 397, 402 (1978).

129. See generally 2 RONALD A. ANDERSON, COUCH CYCLOPEDIA OF INSURANCE LAW 2D §§ 21:4-23 (1959); APPLEMAN & APPLEMAN, *supra* note 100, §§ 10391-10394.

130. See *supra* text accompanying note 86.

131. See H.R. JOURNAL NO. 12, *supra* note 122, at 24. The amount of deposit required remains the same today. ALASKA STAT. § 21.09.090 (1993).

132. The Director of Insurance described the revision as follows:

While voluminous, it is extremely well organized and easy to use. Although all of its parts are related, the different subjects are given complete treatment in respective chapters, and the chapters, in turn group together in accordance with major subject classifications. The plan of organization, which has been called an "organic" plan, since it strives to place each factor of the insurance law in its proper place in relation to the whole, and to avoid the repetition which brings disorganization and confusion to the statutes, is designed not only for proper and clear presentation of the law for the present, but to facilitate and [sic] future growth of the various aspects of the law.

DEP'T OF COM., DIV. OF INS., 1966 ALASKA INS. REP. V.

133. Spencer L. Kimball, *Introduction: Unfinished Business in Insurance Regulation*, 1969 WIS. L. REV. 1019, 1019 (1969). Professor Kimball also referred to the Wisconsin insurance code as "a complex and internally inconsistent jungle of provisions, the objectives of which are seldom clear and the logical relation in which [sic] is never evident." *Id.* His criticisms were in large part responsible for the reform of Wisconsin's insurance laws, which served as a model of reform for other states.

134. It is difficult to address in lay terms some of the arcane topics that are basic to insurance regulation. Statutes addressing actuarial computations or insurance accounting methods, which are unique to the industry, illustrate the

has done a credible job making the code comprehensible.¹³⁵ The clarity of Alaska's insurance code is a result of both good drafting and the legislature's determination to see that all laws be enacted pursuant to a standardized procedure.¹³⁶

Many insurance laws have been enacted on isolated subjects since the 1966 revision, and the work of the 1990 legislature is particularly noteworthy. That year, the legislature sought to address insurer insolvency problems.¹³⁷ The legislature revised chapter 21.78 of the insurance code, which provides the statutory mechanism for rehabilitation and liquidation of an insurer.¹³⁸ The revision granted the director of insurance broad powers to either rehabilitate or liquidate an insurer based upon appropriate

esoteric nature of some topics. *E.g.*, ALASKA STAT. § 21.18 (accounting); § 21.21 (investments); § 21.34 (surplus line taxes); § 21.39 (rates); §§ 21.79-.80 (guaranty funds) (1993).

135. Even the 1937 insurance code, which was just 29 pages, was applauded by some as "cover[ing] the subject as well as many of such codes containing several hundred pages." REPORT OF INS. COMM'R, TERR. OF ALASKA 7 (1939). Reflecting the growth of insurance regulation activities, the current insurance code exceeds 500 pages.

136. "Bills and resolutions shall be prepared and introduced in the manner and form prescribed in the uniform rules and the legislative style manual." ALASKA STAT. § 24.08.060(a) (1993). The drafting manual emphasizes conciseness and simplicity wherever possible. *See generally* LEGISLATIVE AFF. AGENCY, MANUAL OF LEGISLATIVE DRAFTING 46-54 (1983). The legislature also requires that regulations be succinct and easily understandable whenever possible. All state regulatory bodies must follow the drafting guidelines set forth in the Department of Law's *Drafting Manual for Administrative Regulations*. *See* ALASKA STAT. § 44.62.050 (1993). *See also* Northern Lights Motel, Inc. v. Sweaney, 561 P.2d 1176, 1181 n.7 (Alaska 1977). Notwithstanding these efforts, regulations in general have recently been criticized as "difficult to read, hard to understand and contrary to legislative intent." GOVERNOR'S CONF. ON SMALL BUS., FINAL REPORT TO GOVERNOR STEVE COWPER 5 (Nov. 1989), *reprinted in* GOVERNOR'S TASK FORCE ON REGULATORY REFORM, FINAL REPORT (Mar. 19, 1993).

137. Insurance companies are not subject to federal bankruptcy proceedings, and the bankruptcy code provides that liquidation and rehabilitation proceedings against insurers are matters for the states to regulate. *See* 11 U.S.C. § 109(b)(2), (3) (1988). Notwithstanding the exclusive delegation to the states in this area, insurer insolvency issues sometimes invade bankruptcy proceedings. *See generally* Davis J. Howard, *Bankruptcy Proceedings and Insurance Company Insolvency Proceedings: Things That Go Bump in the Night*, 17 OHIO N.U. L. REV. 255 (1990).

138. *See* ALASKA STAT. § 21.78 (1993) (enacting the NAIC's Insurers Rehabilitation and Liquidation Model Act).

statutory grounds.¹³⁹ According to the new law, after commencing delinquency proceedings in the superior court and gaining appointment as receiver, the director must then take certain required actions, similar to those of a corporate CEO in the case of rehabilitation, or to those of a bankruptcy trustee if the decision is made to liquidate the company.¹⁴⁰

The 1990 legislature, with the strong backing of the Governor, also addressed guaranty associations, organizations which administer guaranty funds used to pay covered claims in the event an insurer is unable to do so.¹⁴¹ That year, the legislature passed the Alaska Life and Disability Insurance Guaranty Association Act¹⁴² and amended the Alaska Insurance Guaranty Association Act.¹⁴³

During the 1992 legislative session, the Alaska legislature once again demonstrated its continued commitment to insurance regulation by revising the insurance code.¹⁴⁴ Due in large part to the passage of this legislation and the Division's subsequent adoption of certain regulations,¹⁴⁵ the Division of Insurance achieved an important national distinction in December 1992 when it attained NAIC accreditation.¹⁴⁶ These developments reflect the Division's dedication to protecting consumers, while creating a healthy business environment within which insurers and insurance professionals may operate successfully.¹⁴⁷

139. See *id.* § 21.78.040 (rehabilitation), § 21.78.050 (liquidation).

140. See *id.* § 21.78.090 (rehabilitation), § 21.78.100 (liquidation).

141. See ALASKA STATE LEGIS., SENATE JOURNAL 1049 (1989). Among other things, Governor Cowper was concerned that the previously existing guaranty fund did not adequately protect commercial fishing interests. *Id.*

142. See ALASKA STAT. § 21.79 (1993).

143. See *id.* § 21.80.

144. Act of June 15, 1992, ch. 67, 1992 Alaska Sess. Laws 55. See *infra* text accompanying notes 155-176.

145. The director has general authority to adopt reasonable regulations to implement the insurance code. ALASKA STAT. § 21.06.090 (1993). Some sections of the insurance code also provide specific authority for the adoption of implementing regulations. *E.g., id.* §§ 21.22.130, 21.57.130, 21.89.060.

146. See *infra* text accompanying notes 177-185.

147. The mission statement of the Alaska Division of Insurance states:

The mission of the Division of Insurance is to protect and serve Alaska by developing, interpreting, and enforcing the insurance statutes and regulations; by protecting Alaska insurance consumers; by enhancing the insurance business environment; and by providing information and resources to the public for knowledgeable management of their insurance affairs.

ALASKA DIV. OF INS., 1992 STRATEGIC PLAN 1.

Alaska, a state plagued with employment and environmental hazards, is especially dependent on the insurance industry. Recent statistics indicate that Alaskans work in uniquely dangerous conditions, leading one commentator to note that, "[w]hether on land or at sea, regardless of occupation, Alaskans are more likely to die on the job than workers anywhere else in the nation."¹⁴⁸ Additional safety hazards abound due to Alaska's unique physical environment, including the increased risk of drowning caused by the coldness of Alaskan waters.¹⁴⁹ And, because a large part of Alaska is located in one of the world's most active seismic regions, major earthquakes are always possible. Many Americans are unaware that the 1964 earthquake in Alaska, which devastated downtown Anchorage and many surrounding towns, was more severe than any earthquake ever recorded in California.¹⁵⁰ With metropolitan Anchorage currently containing over half the state's population, a similar earthquake today would have catastrophic consequences.¹⁵¹ It is clear, therefore, that the risks of living in

148. Doug O'Harra, *Man Overboard!*, ANCHORAGE DAILY NEWS, May 2, 1993, at D10. During the 1980's, the annual number of job-related deaths in Alaska was five times the national average. *Id.* Commercial fishermen perish "at an annual rate about 25 times greater than the national average for on-the-job fatalities." *Id.* at D8.

149. *Id.* Between 1980 and 1989, 1,105 deaths or 17.8% of injury deaths were attributable to drowning. *Id.* In 1991, 29 people died in boating accidents in Alaska, a state with 31,000 registered boats. In contrast, the same year there were 56 deaths by boating accidents in Michigan, a state with 860,000 registered boats. Hugh Curran, *Boating Statistics Reveal Alaskans at Risk*, ANCHORAGE DAILY NEWS, June 7, 1993, at B1.

150. By old estimates, the 1964 earthquake measured 8.5 on the Richter Scale, and the San Francisco earthquake of 1906 measured 8.25. Those figures have since been revised to 9.2 for the Alaskan earthquake and 7.9 for San Francisco's. See Hiroo Kanamori, *The Energy Release in Great Earthquakes*, 82 J. GEOPHYSICAL RESEARCH 2981, 2982 (1977).

151. Foreseeing such events, the Division of Insurance is currently in the early stages of developing a disaster response plan. The NAIC has addressed this topic in the past, but has produced no model law yet. Issues which can be expected to be addressed in the disaster response plan will likely include: (1) getting qualified adjusters, with authority to settle claims and provide interim relief, into Alaska in sufficient numbers to provide quick and comprehensive responses to Alaska insurance consumers; (2) creating a fast method of adjudicating claims in the event of a dispute; (3) facilitating a way to allow the necessary reclamation and cleanup without "destroying the scene" which could result in insurance coverage being denied; and (4) ensuring that markets remain in the state after the disaster has passed. The director and two staff members from Alaska's Division of Insurance

Alaska mandate the presence of financially sound insurance companies.

In March 1993, the Governor's Task Force on Regulatory Reform issued its final report.¹⁵² Noting that "[t]he cost of health and other insurance and bonding is prohibitive for most small businesses,"¹⁵³ the task force recommended organizing self-insurance pools, enacting risk-pooling legislation, reducing "health cost-shifting created by uncompensated care," discouraging mandated insurance benefits, instituting tort reform and increasing the bond requirement for general contractors.¹⁵⁴ The Division of Insurance can also help keep the price of insurance down by preventing insurer insolvencies, eliminating claims fraud and monitoring claims practices.

C. The 1992 Omnibus Bill

The Alaska insurance code recently underwent major revisions with the passage of the Omnibus Insurance Reform Act of 1992 (the "Omnibus Bill").¹⁵⁵ A primary purpose of the Omnibus Bill was to update existing laws and provide appropriate authority for the promulgation of needed regulations in order to secure NAIC accreditation. Among other changes, the Omnibus Bill:

- incorporated the NAIC model law on examination of insurance companies, including requirements for processing of examination reports;¹⁵⁶

- granted the director authority to order an insurer to undertake certain actions if that insurer is determined to be in a financially impaired condition;¹⁵⁷

are active with the NAIC's Catastrophe Insurance Working Group of the Personal Lines — Property & Casualty Insurance Committee. That group is working on legislation to be introduced in Congress providing for a program of hazard mitigation and insurance against the risk of catastrophic natural disasters. See *generally* NATURAL DISASTER MITIGATION, RELIEF, AND INSURANCE ACT (Tentative Draft, Nat'l Ass'n Ins. Comm'rs 1993).

152. See GOVERNOR'S TASK FORCE ON REGULATORY REFORM, FINAL REPORT (March 19, 1993).

153. *Id.* at 5 (appendix).

154. *Id.* at 9 (appendix).

155. Act of June 15, 1992, ch. 67, 1992 Alaska Sess. Laws 55.

156. See ALASKA STAT. §§ 21.06.120-210 (1993).

157. *Id.* § 21.09.175.

— required state-accredited reinsurers to file annual financial statements;¹⁵⁸

— adopted limitations on the types of companies in which an insurer may invest and on subsidiary acquisitions which result in market concentration;¹⁵⁹

— adopted limitations on investment in medium and lower grade bonds;¹⁶⁰

— adopted rules on evaluating material transactions between affiliates and determining payment of extraordinary dividends;¹⁶¹

— required insurance holding companies to file annual registration statements;¹⁶²

— consolidated all requirements and qualifications for licensing of insurance professionals in one chapter;¹⁶³

— adopted biennial license renewal requirements for insurance professionals;¹⁶⁴

— prohibited insurance professionals from holding themselves out as financial planners;¹⁶⁵

— increased the penalties for violations of the insurance statutes;¹⁶⁶

— adopted financial requirements for title insurers similar to those required for other insurers;¹⁶⁷

— allowed a receiver to recover insurer distributions to affiliates if those payments were made within twelve months of a liquidation or rehabilitation order;¹⁶⁸

— clarified the timing and determination of eligibility for senior premium discounts in motor vehicle insurance;¹⁶⁹ and

158. *Id.* § 21.12.020(a)(2)(A).

159. *Id.* §§ 21.21.050, .180.

160. *Id.* §§ 21.21.370-.400.

161. *Id.* §§ 21.22.080, .100.

162. *Id.* § 21.22.060.

163. *See generally id.* § 21.27.010-.460. The portion of the insurance code receiving the most changes was the licensing chapter, the rewrite of which took up 67 pages of the 159 page bill.

164. *Id.* § 21.27.380.

165. *Id.* § 21.36.145.

166. *E.g., id.* §§ 21.22.065(h-i) (holding companies), 21.27.440 (licensees), 21.33.065 (unauthorized insurers), 21.34.230 (surplus lines insurance), 21.36.320 (unfair trade practices).

167. *Id.* § 21.66.010.

168. *Id.* § 21.78.325.

169. *Id.* § 21.89.025.

— required automobile and homeowner insurance policies to have an appraisal clause for settling claim disputes.¹⁷⁰

Most provisions of the bill took effect on July 1, 1992.¹⁷¹ Shortly thereafter, the Division, in order to facilitate NAIC accreditation, adopted regulations in the areas of records retention and financial reporting of domestic insurers,¹⁷² life reinsurance agreements,¹⁷³ insurance holding companies requirements,¹⁷⁴ standards for determining insurers' impaired financial condition,¹⁷⁵ and risk retention groups and purchasing groups.¹⁷⁶ The passage of the Omnibus Bill, together with the adoption of these regulations, set the stage for the visit by the NAIC accreditation review team in October 1992.

D. NAIC Accreditation

Gaining NAIC accreditation in December 1992 was a watershed event in the history of insurance regulation in Alaska.¹⁷⁷

170. *Id.* § 21.89.035.

171. Act of June 15, 1992, ch. 67, 1992 Alaska Sess. Laws 55.

172. ALASKA ADMIN. CODE tit. 3, §§ 21.400-.480 (July 1993). One of the most notable of these regulations is the requirement that domestic insurers must retain certain records "for 10 years from the date the record was created, or longer if ordered by the director." *Id.* § 21.470.

173. *Id.* §§ 21.600-.695.

174. *Id.* §§ 21.010-.195.

175. *Id.* §§ 21.500-.520.

176. *Id.* §§ 24.010-.590.

177. The NAIC instituted a formal state accreditation program in 1990. An independent review team, whose job it is to assess a particular state's compliance with the NAIC's Financial Regulation Standards and ability to regulate its insurance industry, evaluates each state seeking accreditation. To become accredited, a state must adopt laws substantially similar to the NAIC models. *See generally* NATIONAL ASS'N OF INS. COMM'RS, FINANCIAL REGULATION STANDARDS AND ACCREDITATION PROGRAM OF THE NAIC, March 19, 1993, at 1 [hereinafter NAIC FINANCIAL REGULATION STANDARDS]. The accreditation program is premised on the belief that to have effective insurer solvency regulation, a state must not only have adequate statutory and administrative authority to regulate an insurer's corporate and financial affairs, but adequate funding and organizational and personnel practices designed to implement that authority. *Id.*; *see generally* RICHARD L. FOGEL, U.S. GEN. ACCOUNTING OFFICE, INSURANCE REGULATION: ASSESSMENT OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (1991). As an incentive for states to become accredited, after December 1993, those states already accredited will only accept reports of insurer examinations from unaccredited states under limited circumstances. NAIC FINANCIAL REGULATION STANDARDS, *supra*, at 1. Still, such

Division personnel together expended thousands of hours at achieving this goal, and the Division is presently one of only twenty-two¹⁷⁸ NAIC-accredited state regulatory agencies in the country.¹⁷⁹ The accreditation process is ongoing, and the failure of an NAIC member to stay current with the organization's standards may result in accreditation being suspended. Thus, the Division of Insurance will need to continue updating laws and regulations periodically in order to maintain its accredited status.¹⁸⁰

There are a number of reasons why NAIC accreditation is beneficial to Alaska. Initially, accreditation affords Alaska reciprocity with other accredited states with respect to financial examinations and data on insurance companies. This information sharing should enable Alaska's regulators to save money by concentrating their limited resources on domestic concerns without having to spend an undue amount of time investigating foreign insurers, thus providing consumers with a greater sense of security. Insurers should also feel more comfortable doing business in the state, resulting in an increase of international insurance carriers in the Alaska market.¹⁸¹ Such increased competition from more companies might lead to lower premium rates for insurance

measures do not correct the fundamental weakness of the NAIC—its lack of enforcement power. See Douglas McLeod, *The NAIC: Too little too late*, BUS. INS., Dec. 7, 1992, at 4; see also *FAILED PROMISES*, *supra* note 60, at 2.

178. As of November 1992, 23 states had achieved accreditation. However, the NAIC's suspension of the New York Department of Insurance in March 1993 for failure to meet ongoing accreditation standards reduced the number to 22. *Committee Considers Additional Changes to Accreditation Standards, Suspends New York's Accreditation*, NAIC NEWS (Nat'l Ass'n of Ins. Comm'rs, Kansas City, Mo.), March 1993, at 7.

179. In 1993, Alaska's Director of Insurance, David J. Walsh, was the Vice President of the NAIC and the chair of the NAIC's governing body, the Executive Committee.

180. Over the years, the Alaska Division of Insurance has adopted many of the NAIC model laws, and NAIC source materials are useful resources for interpreting the legislative history of those laws and regulations. Guidance for interpreting NAIC model laws and regulations may be found in the multi-volume *NAIC Model Laws, Regulations and Guidelines*. See NAIC MODEL LAWS, *supra* note 42. The publication includes interpretative cases and legislative history as well as references to drafting notes and minutes of NAIC proceedings.

181. Margaret Bauman, *Insurance division wins accreditation*, ALASKA J. OF COM., Jan. 11, 1993, at 1. According to the current Director of Insurance, accreditation will do more to secure a good insurance market for Alaska residents and businesses than any other single factor. See *id.* at 1-5.

consumers,¹⁸² while more admitted insurers in Alaska should increase premium tax revenues for the state.¹⁸³

Finally, participation in the NAIC should encourage the Division of Insurance to employ professionals who are knowledgeable about current insurance regulation issues. The NAIC is a resource for state-of-the-art training and education in the regulators' respective disciplines,¹⁸⁴ and with its help, Alaska's regulators should be able to create and implement public policy on a state level as well as contributing to the evolution of national insurance issues.¹⁸⁵

E. The Judiciary's Role in Regulating Insurance

The Division of Insurance is not the sole regulator of Alaska's insurance industry, as federal and state courts play a smaller, albeit significant, role. Federal courts are often called upon to interpret

182. *Id.*

183. The Director of Insurance commented in the 1960 annual report that the increase in admitted insurers was a factor in the substantial increase in premium tax revenues collected. ALASKA DIV. DEP'T OF COM., REP. OF THE DIV. OF INS. 1 (1960). At some level, however, an increase in admitted insurers could result in reduced premium prices, with an attendant negative impact on premium tax revenue.

184. The Division of Insurance will host the Fall 1996 NAIC convention in Anchorage. The meeting is expected to attract approximately 1000 participants and bring three million dollars into the Alaska economy.

185. In recent years, however, Congress has questioned the NAIC's effectiveness, as well as the state-based system of insurance regulation. McLeod, *supra* note 177, at 3; see also Cynthia Borrelli, *Public Regulation of Insurance Law: Recent Developments*, 27 TORT & INS. L.J. 418 (1991). In 1988, Representative John Dingell commenced an investigation into the adequacy of insurance regulation, and the NAIC has faced increasing congressional criticism since that time. A study commissioned by Representative Dingell addressing the NAIC's capacity to create and maintain an effective national system for solvency regulation concluded that while the NAIC has good intentions, its efforts were likely to be unsuccessful, as it does not have the authority to require states to adopt and enforce its standards. Federal intervention into this area of insurance regulation was recommended. See FOGEL, *supra* note 177, at 1, 4-8, 32-33; see also FAILED PROMISES, *supra* note 60, at 2. Currently, there is a bill in Congress pending that would create a cabinet level administrator to regulate insurance at the federal level. H.R. 1257, 103d Cong., 1st Sess. (1993) (sponsored by Representative Joseph P. Kennedy, Jr.). The bill would create a new regulatory body, the Federal Insurance Administration, with an administrator appointed by the President. *Id.* It is not expected to pass in 1993. *Subcommittee on Consumer Credit and Insurance Holds Two-Day Hearing on H.R. 1257*, NAIC NEWS (Nat'l Ass'n of Ins. Comm'rs, Kansas City, Mo.), Apr. 1993, at 6.

the McCarran-Ferguson Act,¹⁸⁶ and they frequently deal with coverage issues.¹⁸⁷ The United States Supreme Court recently issued an opinion regarding the availability of punitive damage awards against insurers.¹⁸⁸ State courts on the other hand, charged with interpreting their state insurance codes and regulations, as well as adjudicating claims disputes, also affect industry regulation.¹⁸⁹

The Alaska Supreme Court is quite active in the insurance field, having adopted most of the nationally recognized insurance law principles.¹⁹⁰ The court has held that insurance policies are considered contracts of adhesion¹⁹¹ and, consequently, even where

186. See generally Kimball & Heaney, *supra* note 49.

187. Pursuant to diversity jurisdiction, federal courts handle lawsuits involving insurance claims. In those cases, the courts interpret the applicable substantive law as would the appropriate state court. See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); 1A JAMES W. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ .301-.312 (2d ed. 1993); see, e.g., *LeDoux v. Continental Ins. Co.*, 666 F.Supp. 178 (D. Alaska 1987) (insurance coverage of punitive damages for unintentional torts does not violate public policy).

188. See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Large punitive damage awards coupled with expanding theories of liability contributed to the tort reform movement of the mid-1980's. See generally Laurence Keyes, *Alaska's Apportionment of Damages Statute: Problems for Litigants*, 9 ALASKA L. REV. 1 (1992). In 1986, Alaska's Director of Insurance recognized in his annual report that Alaska was one of nine states that year to adopt significant tort reform legislation. ALASKA DIV. OF INS., 48TH ANNUAL INS. REPORT 1 (1986). As a consequence of this reform, capacity for Alaska risks increased and premiums stabilized to the benefit of Alaska insurance consumers. *Id.*

189. See, e.g., ALASKA STAT. §§ 9.05.015(a)(10) (1983) (jurisdiction for dispute arising from insurance contract); 21.06.230 (1993) (order by director may be appealed to superior court); 44.62.300 (1993) (judicial review of validity of regulations).

190. See generally APPLEMAN, *supra* note 2, §§ 7401-07. *Whispering Creek Condominium Owner Ass'n v. Alaska Nat'l Insurance Co.*, 774 P.2d 176 (Alaska 1989), contains a comprehensive survey of Alaska case law pertaining to the interpretation of insurance contracts. *Id.* at 177-78.

191. *Jarvis v. Aetna Casualty and Sur. Co.*, 633 P.2d 1359, 1363 (Alaska 1981). A contract of adhesion is marked by unequal bargaining power between the parties such that one party is forced to "take it or leave it." In the context of insurance policies, one party (the insurer) drafts the contract language and the terms are non-negotiable. See generally APPLEMAN, *supra* note 2, § 7401. Describing the non-negotiable nature of such contracts, the United States Supreme Court stated long ago:

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters,

the policy contains no ambiguities, it will be construed to provide the coverage that would reasonably be "expected from a lay interpretation of the policy terms."¹⁹² In addition, while construing coverage provisions in favor of insureds, the court will narrowly construe exclusions against the insured.¹⁹³

The Alaska Supreme Court has also held that an insurer's obligation to defend an insured is broader than its obligation to indemnify.¹⁹⁴ The obligation to defend¹⁹⁵ requires that the insurer provide a defense for the entire action if any part of a lawsuit falls within the scope of coverage afforded.¹⁹⁶ Even where the complaint states a claim outside the policy, the insurer must defend if "the true facts are within, or potentially within, the policy coverage and are known or reasonably ascertainable to the insurer."¹⁹⁷ The defense obligation also requires that the insurer

promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that "it is illusory to speak of a liberty of contract."

German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 416-17 (1914). See also KIMBALL, *supra* note 22, at 523.

192. United States Fire Ins. Co. v. Colver, 600 P.2d 1, 3 (Alaska 1979); Puritan Life Ins. Co. v. Guess, 598 P.2d 900, 904 (Alaska 1979).

193. Starry v. Horace Mann Ins. Co., 649 P.2d 937, 939 (Alaska 1982). Courts, however, will not torture a policy into providing coverage where the exclusionary language is clear. *Jarvis*, 633 P.2d at 1363.

194. Smith v. Great Am. Ins. Co., 629 P.2d 543, 545-46 (Alaska 1981). The most fundamental duty an insurer owes an insured is the duty to indemnify, i.e. to reimburse the insured for losses incurred directly by the insured or to pay sums that the insured becomes legally obligated to pay others. See ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES 278 (1988).

195. *Afcán* v. Mutual Fire, Marine & Inland Ins. Co., 595 P.2d 638, 645 (Alaska 1979). The following rules apply to the insurer's duty to defend. The existence of such a duty is a matter of contract interpretation. The duty must be undertaken where a complaint on its face alleges a claim potentially within policy coverage. *Id.* The wrongful refusal to defend may result in the insurer's liability for the judgment even though the facts may ultimately demonstrate that no indemnity is due. *Sauer v. Home Indem. Co.*, 841 P.2d 176, 184 (Alaska 1992). If the insurer has a basis for a potential conflict of interest, the insured has the unilateral right to select independent counsel, subject to the implied covenant of good faith and fair dealing. *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1120-21 (Alaska 1993); see also Jim Walker & Naomi W. Klouda, *Court: Insured Can Select Own Lawyers*, ALASKA J. OF COM., June 7, 1993, at 1B (Journal of Law section) (discussing the probable consequences of the *CHI* decision).

196. United States Fire Ins. Co. v. Colver, 600 P.2d 1, 4 n.4 (Alaska 1979).

197. *Afcán*, 595 P.2d at 646 (quoting National Indem. Co. v. Flesher, 469 P.2d

inform the insured of all settlement offers and alert the insured to the possibility of excess recovery.¹⁹⁸ In light of Alaska's unusual attorney's fees rule, which awards fees to the prevailing party,¹⁹⁹ the Alaska Supreme Court has held that a settlement for the "policy limits," where the insurance policy provides for the coverage of court costs without a cap, includes the face value of the policy *plus* attorney's fees based on a projected verdict.²⁰⁰

Most Alaska Supreme Court decisions involving insurance issues do not turn on an interpretation of the insurance code or regulations, although there are some notable exceptions. *O.K. Lumber Co. v. Providence Washington Insurance Co.*²⁰¹ concerned a third-party claimant suing an insurer for poor claims handling practices.²⁰² The court ruled that third-party claimants do not have a private cause of action under Alaska's Unfair Claims Settlement Practices Act.²⁰³

*State Farm Fire & Casualty Co. v. Nicholson*²⁰⁴ involved the bad faith failure of an insurer to settle a homeowner's claim.²⁰⁵ After a judgment at trial in favor of the homeowner, State Farm appealed, arguing that the tort of bad faith claims handling had been recognized in Alaska only in the context of third-party claims.²⁰⁶ The court, however, held that a cause of action against an insurer for bad faith claims handling sounds in tort even for first-party claims.²⁰⁷ The court reasoned that the tort of bad faith "can be traced to the covenant of good faith and fair dealing," a contractual duty which the court emphasized is "implied in all insurance policies."²⁰⁸ The court also rejected the insurer's

360, 366 (Alaska 1970)).

198. *O.K. Lumber Co. v. Providence Washington Ins. Co.*, 759 P.2d 523, 525 (Alaska 1988).

199. ALASKA R. CIV. P. 82(a).

200. *Schultz v. Travelers Indem. Co.*, 754 P.2d 265, 266-67 (Alaska 1988); ALASKA ADMIN. CODE tit. 3, § 29.010 (July 1993). In automobile insurance cases, this fee-shifting also requires payment of pre-judgment interest in addition to the policy limits. *Hughes v. Harrelson*, 844 P.2d 1106, 1107-08 (Alaska 1993).

201. 759 P.2d 523 (Alaska 1988).

202. *Id.* at 524.

203. *Id.* at 527.

204. 777 P.2d 1152 (Alaska 1989).

205. *Id.*

206. *Id.* at 1154; *see also supra* note 15 (defines the term "third-party" claim).

207. *State Farm*, 777 P.2d at 1156.

208. *Id.* at 1154.

argument that the insurance code provided sufficient incentive for insurers to honor the duty of good faith and fair dealing, stating that the legislature, in adopting the insurance code, did not intend to alter an insured's right to seek punitive damages from an insurer.²⁰⁹ In light of the adhesion aspects of an insurance contract, the court noted that the availability of this new tort action will provide insurers with a greater incentive to honor their implied covenant of good faith and fair dealing to their insureds.²¹⁰

An issue that may soon face an Alaska court is whether the attorney-client privilege and work-product doctrine protect insurance files from inspection by the Division of Insurance. Recently, a dispute erupted when the Division attempted to inspect a claims adjuster's records pursuant to Alaska Statutes sections 21.06.170 and 21.27.350.²¹¹ The attorney for the claims adjuster argued that the Division had no authority over the file and, alternatively, that the file was protected by the attorney-client privilege and the work-product doctrine.²¹² The Division contended that neither the attorney-client privilege nor the work-product doctrine deprives it of rights granted under the insurance code, reasoning that otherwise the floodgates would open for any licensee to circumvent regulatory authority through its attorney.²¹³ Due in part to the delicate nature of the claim, the matter was resolved to the Division's satisfaction without court involvement. It may be just a matter of time, however, before the judiciary is called upon to determine whether the examination provisions of the insurance code preempt the attorney-client privilege and work-product doctrine.²¹⁴

209. *Id.* at 1157-58.

210. *Id.*

211. *See In re Eyman*, D92-15 (Alaska Dep't of Com. and Econ. Dev., Div. of Ins., May 5, 1993).

212. Memorandum, State of Alaska, Dep't of Law, Jan. 7, 1993, at 4-7 (on file with the author).

213. *Id.* at 5.

214. The Alaska Supreme Court has already limited the scope of the work product doctrine and attorney-client privilege in the insurance context. *See Langdon v. Champion*, 752 P.2d 999 (Alaska 1988) (concluding that (1) "statements made by an insured to an insurer are not protected by the attorney-client privilege unless it can be shown that the insurer, in receiving such communication, was acting at the express direction of counsel for the insured" and (2) "materials contained in an insurer's files shall be presumed to have been compiled in the ordinary course of business, and, thus, outside the scope of the

F. Alaska's Enforcement Mechanism

1. *Scope.* An insurance regulatory agency may appropriately be characterized as a specialized law enforcement agency.²¹⁵ With the exception of insurance-related crimes, which are handled by the Department of Law,²¹⁶ the Division of Insurance is exclusively responsible for implementing, monitoring and enforcing the insurance laws—activities which may include both investigation and adjudication.²¹⁷ The Division of Insurance consists of seven sections: (1) administrative, (2) licensing,²¹⁸ (3) market surveillance/conduct,²¹⁹ (4) financial examination,²²⁰ (5) consumer

work-product doctrine, absent a showing that the materials were prepared at the request or under supervision of the insured's attorney").

215. Pfennigstorf, *supra* note 62, at 1026.

216. See ALASKA STAT. § 21.36.360 (1993).

217. *Id.* § 21.06.080 (broad general powers to conduct examinations and investigations); see also *id.* § 21.06.220 (director sits "in a quasi-judicial capacity"). In a long-recognized classic work addressing insurance regulation, it is stated: "[s]ometimes the insurance commissioner is an official clerk, sometimes he is a judge, sometimes he is a law-giver, and sometimes he is both prosecuting attorney and [executioner]. He is partly executive, partly judicial, and partly legislative; and yet is not confined within any of these categories." EDWIN W. PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* 5 (1927). Thus, it is not uncommon for an agency to undertake multiple responsibilities. See 3 KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 18.1, 18.4 (2d ed. 1980); *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976); *Withrow v. Larkin*, 421 U.S. 35, 49-52 (1975); *In re Robson*, 575 P.2d 771, 774 (Alaska 1978); *In re Cornelius*, 520 P.2d 76, 83-84 (Alaska 1974).

218. For that portion of the insurance industry comprised of non-insurers (i.e. agents, brokers, adjusters, etc.) licensing is an important regulatory tool. The NAIC has described states' broad licensing powers, including the licensing of insurers, as "[o]ne of the pillars, if not the keystone of state regulation." *Memorandum of Explanation of Proposed Text of Legislation*, NAIC PROC. (Nat'l Ass'n of Ins. Comm'rs, Kansas City, Mo.), Nov. 1944, at 35. With recent increases in staffing, the licensing section in the Alaska Division of Insurance has been able to scrutinize representations made by applicants.

219. This section deals with a wide range of matters, including national and local insurance issues, consumer complaints, insurer filings, failures to comply with existing statutes or regulations and the dissemination of information to the public. Specifically, this section monitors insurers' policy forms. See ALASKA STAT. § 21.42.120(a) (1993) (All insurance contracts must be filed with and approved by the director of insurance.). It also performs market conduct exams of admitted insurers and licensees and identifies financially impaired insurers. See ALASKA ADMIN. CODE tit. 3, § 21.520(a)(1) (July 1993) (To identify financially impaired

services, (6) law/enforcement²²¹ and (7) actuarial.²²² The director does not participate in the prosecution of matters that reach the hearing stage, however, as insurance code violations are handled by the Division's attorney in the law/enforcement section. While this section has primary responsibility for investigating potential violations, all personnel of the Division are available to assist it with investigations of civil violations of the code. For example, staff financial examiners assist with audit-related tasks, and market analysts assist with market conduct exams. Both identify violations of the insurance code.

insurers, the director may consider "findings reported in financial condition and market conduct examination reports prepared by the division or another licensing jurisdiction."). And, finally, it plays an important role in consumer protection, a primary objective of insurance regulation. See *Northern Adjusters, Inc. v. Dep't of Revenue*, 627 P.2d 205, 207 (Alaska 1981) (The purpose of the insurance code "is to protect the Alaskan insurance consumer."). The director is required to inform the public about their insurance rights and the availability of the agency's services. ALASKA STAT. § 21.06.115 (1993). In May 1990, the Division published the Insurance Consumer Guide, a publication designed to provide a general overview of the different kinds of insurance available, as well as insurance consumers' rights. See *Cutting Through the Maze*, ANCHORAGE TIMES, Oct. 8, 1990, at B4.

220. This section conducts financial examinations of insurance companies applying for certificates of authority in Alaska, as well as examinations of persons and companies other than insurers who are licensed by the Division. In addition, it reviews insurers' annual financial statements and monitors the financial status of insurers, both admitted and nonadmitted, that do business in the state. Current eligible nonadmitted insurers are enumerated in the Division's Bulletin B93-11, commonly referred to as the "white list." It is updated at least twice annually pursuant to ALASKA STAT. § 21.34.050 (1993).

221. The attorneys assigned to work for the Division of Insurance are employees of the Civil Division of the Attorney General's Office. In 1990, the law/enforcement section had two attorneys working with it, which is a small number compared to other states. 1991 NAIC RESOURCES REP., *supra* note 22, at 6 (noting that in 1991, California's insurance department had 52 lawyers, Florida's 36, New York's 39 and Texas' 38).

222. The newest section of the Division of Insurance, the actuarial section has as its mission "to enforce statutory and regulatory rate and reserve standards for insurers, and to inform the public about industry issues." ALASKA DIV. OF INS., 1992 STRATEGIC PLAN, at 10. The primary duties of this section involve reviewing the rates charged by insurers and monitoring their solvency through periodic examinations of their records. The increased pressure nationally for more effective insurance regulation has resulted in increased reliance on actuaries.

The scope of the Division's regulatory authority is broad, encompassing power over "[a]ll persons²²³ transacting²²⁴ a business of insurance²²⁵ in this state, or relative to a subject resident, located or to be performed in this state."²²⁶ In fulfilling this charge, the director of insurance has the right to subpoena both

223. "Person" has the meaning given in A.S. § 01.10.060 and includes an insurer, Lloyd's, fraternal benefit society, medical service or hospital service plan as defined in A.S. § 21.87, reciprocal or interinsurance exchange, syndicate and any other legal entity engaged in the business of transacting insurance, including agents, brokers, and claims adjusters." ALASKA STAT. § 21.90.900(28) (1993).

224. "Transact" with respect to insurance is defined to include solicitation and inducement, preliminary negotiations, effectuation of a contract of insurance and the transaction of matters subsequent to effectuation of the contract of insurance and arising out of it. *Id.* § 21.90.900(39). This is a broad definition. It includes communications of any nature by which a person participates in the sale of an insurance product. It also includes communications with a nexus to the claims process or which facilitate an exchange of contractual consideration. *Id.*

225. "Insurance" is defined as "a contract whereby one undertakes to indemnify another or pay or provide a specified or determinable amount or benefit upon determinable contingencies." *Id.* § 21.90.900(22) (emphasis added). Hence, "self insurance" is not technically insurance at all, as it lacks the element of risk transfer. Therefore, the insurance code, by way of the Division of Insurance, does not regulate self-insurance. *Cf. id.* §§ 21.33.061 (requiring self-insurers utilizing excess loss, catastrophe or other insurance on risks in Alaska to file a report for the purpose of determining premium taxes) & 21.55.140 (excluding certain self-insurance from the state pooled health insurance plan). Like most states, Alaska has traditionally provided for the use of self-insurance in the contexts of workers compensation and motor vehicles. *Id.* §§ 23.30.045 (1990) & 28.20.400 (1989). Recently, the Alaska legislature also addressed self-insurance with regard to oil spill liability. *Id.* § 46.04.040 (Supp. 1993).

The use of self-insurance is increasing in our country. In 1992 it accounted for \$46 billion in written premium equivalents. This represents 27% of companies' risk management needs for property/casualty risks, as compared to 64% insured through the conventional market (a 15% increase over 1991). *See Alternative Risk Financing Continues to Gain Strength*, BUS. INS., Jan. 25, 1993, at 3. As more and more entities turn to self-insurance, there is a corresponding demand for stop-loss insurance. This provides a cap on the self-insurance risk in the event of a catastrophic loss or an inordinate number of claims. David Oliveri, *Market to Protect Self-Insured Firms Grows*, BOSTON BUS. J., Dec. 21, 1992, at 5.

In addition, some guaranteed investment contracts (GICs), often purchased as pension assets, may not technically be insurance due to the absence of a life element. Even though the sale of the product may not be regulated, the insurer can always be monitored for impaired financial condition that may result from the purchase or sale of such products.

226. ALASKA STAT. § 21.03.010(a) (1993).

records and testimony under oath,²²⁷ and, like some other state agencies, can also seek contempt sanctions from the superior court in the event of non-compliance with a subpoena.²²⁸ Since authorized insurers and licensees are required by the insurance code to keep adequate records of their transactions,²²⁹ the subpoena power gives the director a useful tool in enforcing record keeping requirements. Furthermore, the subpoena power is an effective means of obtaining documents and witness statements during the course of an investigation, including medical records.²³⁰ The subpoena power is a useful tool in combating insurance fraud.²³¹

2. *Examinations and Investigations.* The insurance code states that "[t]he director may conduct examinations and investigations of insurance matters, in addition to examinations and investigations expressly authorized, considered proper to determine whether any person has violated a provision of this title or to secure information useful in the lawful administration of its provisions."²³² "Examinations" refers to the examination of any person or entity who is required to obtain permission from the Division of Insurance prior to transacting the business of insurance.

Under Alaska Statutes section 21.06.120, the director is authorized to "examine the affairs, transactions, accounts, records, and assets of each authorized and formerly authorized insurer and each licensed and formerly licensed managing general agent, reinsurance intermediary broker, reinsurance intermediary manager, surplus lines broker, and surplus lines association as often as the director considers advisable."²³³ In addition, Alaska

227. *Id.* § 21.06.170(a).

228. *Id.* § 21.06.170(d).

229. *Id.* § 21.69.390(a); ALASKA ADMIN. CODE tit. 3, § 21.460 (July 1993); *see also* ALASKA STAT. § 21.21.350 (1993).

230. A health care provider should have no fear of incurring civil liability for releasing records so long as the Division complies with Alaska Statutes section 21.06.170. *Arnett v. Baskous*, 856 P.2d 790, 792 (Alaska 1993) (holding that a physician was not liable for releasing medical records pursuant to a valid subpoena).

231. *See generally* ALASKA STAT. § 21.36.360 (1993) (fraudulent or criminal insurance acts).

232. *Id.* § 21.06.080(c).

233. *Id.* § 21.06.120. The director's injunctive powers are also important and are frequently used in enforcement actions. *See id.* §§ 21.22.065(b), (h) (unlawful acquisition of insurance company); 21.27.405(b) (violation of licensing chapter); 21.36.320(c) (unfair trade practices).

Statutes section 21.06.130 provides that “[t]o determine compliance with this title, the director may as often as the director considers advisable examine or require a written report from a person of the accounts, records, documents, and transactions pertaining to or affecting the insurance affairs or proposed insurance affairs” of an insurance producer, independent adjuster, or person engaged in or proposing to engage in the promotion or formation of a domestic insurer or insurance holding corporation, or corporation to finance a domestic insurer or the production of its business.²³⁴ For an insurer, the examination typically takes place at its home office, and for non-insurers at the location of their records.²³⁵

Examinations, which may be conducted under contract, result in a written report that is filed with the Division of Insurance.²³⁶ In most cases, the expenses of an examination, which can be substantial, are passed on to the examinee.²³⁷ The market surveillance and the financial examination sections are active participants in examining insurance companies.

3. *Sanctions.* Sanctions can be characterized as either fines or licensing actions. Although a general penalty provision provides that any violation of the insurance code may be sanctioned through a fine not to exceed \$2500,²³⁸ many chapters of the code have their own penalty provisions.²³⁹ For example, under Alaska Statutes section 21.09.260, if, after a hearing, the director finds that

234. *Id.* § 21.06.130.

235. *Id.* § 21.06.140(a).

236. *Id.* § 21.06.150(b).

237. *Id.* § 21.06.160(a). The director has broad discretion to retain professionals to conduct the examination. *See id.* § 21.06.140(d); *see also id.* § 21.22.110(c) (director given discretion in examining insurance holding company to retain professionals at registered insurer’s expense). Having the examinee pay expenses is an old practice, and the territorial legislature required this as far back as 1937. Act of Mar. 4, 1937, ch. 22, 1937 Alaska Sess. Laws 63 (“The expenses of an examination into the affairs and condition of any insurance company or society shall be borne by the company or society examined, unless remitted by the Commissioner.”). Legislative history for the 1966 revision reveals that, at the time, the insurance industry supported this expense allocation device. HOUSE COM. COMM. OF ALASKA, ALASKA INS. CODE, H.R. JOURNAL SUPP. NO. 12, at 23 (Feb. 16, 1966).

238. ALASKA STAT. § 21.90.020 (1993).

239. *E.g., id.* §§ 21.09.260 (authorized insurers), 21.27.440 (licenses), 21.33.065 (unauthorized insurers), 21.34.230 (surplus lines insurance), 21.39.160 (rates), 21.57.150 (credit insurance), 21.66.430 (title insurance) and 21.86.250 (“HMOs”).

an insurer engaged in a prohibited act, the insurer is subject to a civil penalty of not more than \$2500 for each violation.²⁴⁰ In 1992, penalties for violations of the licensing chapter were modified to include:

- (1) a civil penalty equal to the compensation promised, paid, or to be paid, directly or indirectly, to a licensee in regard to each violation;
- (2) either a civil penalty of not more than \$10,000 for each violation or a civil penalty of not more than \$25,000 for each violation if the director determines that the person wilfully violated the provisions of this chapter; and
- (3) denial, nonrenewal, suspension, or revocation of a license.²⁴¹

Civil fines are a common means of sanctioning insurance code violations.²⁴² While not punitive in nature, these sanctions fulfill a variety of functions, including deterring the insurer or insurance professionals such as applicants, respondent licensees or other licensees from similar conduct.

The director has broad discretion to suspend or revoke an insurer's license,²⁴³ as well as the license of an insurance profes-

240. *Id.* § 21.09.260.

241. *Id.* § 21.27.440.

242. Whether a formal administrative proceeding is commenced, imposition of a fine must be pursuant to the director's order. If the fine is negotiated as part of a settlement, the agreement must be adopted by order of the director. The order must specify the time period within which the fine must be fully paid, a period not less than 15 days nor more than one year after the date of the order. In the 1992 Omnibus Bill, the legislature acknowledged the importance of licensing sanctions by providing that the failure to pay a fine when due provides a basis for revocation of all licenses not already revoked, without a hearing. *Id.* § 21.27.440(b); *see also* *Bankers Life & Casualty Co. v. Alexander*, 45 N.W.2d 258, 263 (Iowa 1950) (Statutes "regulating the insurance business are remedial in character, enacted under the state's police power upon the theory the business is impressed with a public interest and the public is entitled to protection against illegal practices."); *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 528 (Alaska 1980).

243. ALASKA STAT. § 21.09.150 (1993). In some instances, the director is required to suspend or revoke an insurer's license. *Id.* § 21.09.140. The Alaska Supreme Court has characterized the director's discretionary powers as follows:

In matters of occupational licensure the decision to initiate proceedings for revocation or suspension is comparable to the function of a public prosecutor in deciding whether to file a complaint. Questions of law and fact, of policy, of practicality, and of the allocation of an agency's resources all come into play in making such a decision. The weighing of these elements is the very essence of what is meant when one speaks of an agency exercising its discretion.

Vick v. Bd. of Elec. Examiners, 626 P.2d 90, 93 (Alaska 1981).

sional. There are numerous grounds for denial, nonrenewal, suspension or revocation of licenses. For insurance professionals, examples of conduct which could jeopardize a party's license include, among other things, misrepresentation in the license application, any violation of a provision of the insurance code, misuse of money held in a fiduciary capacity, and intentional misrepresentation of the terms or effect of an insurance policy.²⁴⁴ Finally, since licenses are granted to firms as well as individuals, the license of a firm and its principal or manager may be jeopardized if illegal actions are undertaken by a person acting on behalf of the firm.²⁴⁵

Trustworthiness is an important consideration in determining whether to grant a license under the insurance code.²⁴⁶ The code expressly provides that license applicants must be trustworthy.²⁴⁷ In accordance with Alaska Statutes section 21.27.040, license applicants must "declare under penalty of denial, nonrenewal, suspension, or revocation of a license issued by the director that the statements made in or in connection with the application are true, correct, and complete to the best of the applicant's knowledge and belief."²⁴⁸ And, Alaska Statutes section 21.27.410(a)(8) provides that denial, nonrenewal, suspension, or revocation of a license may be based on the director's determination that the conduct or affairs

244. ALASKA STAT. § 21.27.410(a) (1993).

245. *Id.* § 21.27.410(b).

246. Research reveals no published Alaska cases addressing denial of an insurance license based on untrustworthiness. Other cases throughout the country, however, overwhelmingly reflect the appropriateness of denying or revoking a license for untrustworthiness. *E.g.*, *Taylor v. Montgomery*, 413 A.2d 923 (D.C. 1980) (insurance solicitor's license application denied due to untrustworthiness); *Department of Ins. v. Hendrickson*, 196 N.E.2d 574 (Ind. 1964) (omission of arrest in application of bail bondsman showed untrustworthiness); *McKie v. Corcoran*, 556 N.Y.S.2d 732 (1990) (insurance broker's license revoked due to untrustworthiness and refusal to cooperate in investigation); *Bartholomew v. State of N.Y. Ins. Dep't*, 469 N.Y.S.2d 219 (1983) (insurance broker's license application denied due to untrustworthiness).

247. ALASKA STAT. § 21.27.020(a) (1993).

248. *Id.* § 21.27.040(a). In 1992, the Division of Insurance joined other states that require an applicant for a license to sign a sworn Authorization and Release. This document authorizes the disclosure of educational records, work history records, and records of other insurance regulatory agencies and allows the Division to more easily investigate the applicant's moral character, professional reputation, and fitness for licensure.

of a licensee reflects untrustworthiness.²⁴⁹ Finally, the statutes allow inquiry into the truth or falsity of facts included in an application at any time.²⁵⁰

The Division is obligated to report to the NAIC enforcement proceedings involving licenses applied for or issued. Because the matter will then become accessible to other insurance regulatory agencies via computer linkup, the consequences of untruthfulness go beyond Alaska.

4. *Hearings.* Hearings involving the Division of Insurance may be held for a wide variety of reasons. General statutory authority gives the director discretion to "hold hearings for any purpose within the scope of this title considered to be necessary."²⁵¹ The director must hold a hearing "if required by a provision of this title, or upon written demand by a person aggrieved by an act, threatened act, or failure of the director to act, or by a report, regulation, or order of the director."²⁵² Alaska Statutes sections 21.06.170-240 provide the hearing mechanism for enforcement proceedings.²⁵³ While not required under the code, as a matter of convention, Alaska's Administrative Procedure Act ("APA")²⁵⁴ is followed for nearly all hearings involving the Division of Insurance.²⁵⁵ The convenience factor

249. *Id.* § 21.27.410(a)(8). The Omnibus Bill contains a new requirement that a licensee must notify the director within 30 days of a suspension or revocation of a license by another state, or a conviction of any misdemeanor or felony. *Id.* § 21.27.025(a). The failure to comply with this requirement reflects an applicant's untrustworthiness.

250. *Id.* § 21.27.410(a)(1).

251. *Id.* § 21.06.180(a).

252. *Id.* § 21.06.180(b). *E.g., id.* §§ 21.27.405 (licensing) & 21.36.320 (unfair trade practices). The 1992 Omnibus Bill changed Alaska Statutes section 21.06.150 so that a hearing is no longer required prior to the finalization of an examination report. *Id.* § 21.06.150(b).

253. *Id.* §§ 21.06.170-240. These provisions are referred to in other areas of the code. *See, e.g., id.* §§ 21.09.175 (order affecting financially impaired insurer), 21.09.260 (insurer engaged in prohibited act) & 21.22.170 (insurer violating Insurance Company Holding Act). Two notable exceptions to hearing procedures are rate hearings and hearings pertaining to the newly created Comprehensive Health Insurance Association. The former does not have an opportunity for hearing officer involvement, while the latter is expressly exempt from Alaska's Administrative Procedure Act. *Id.* §§ 21.06.240, 21.39.170, 21.55.050.

254. *Id.* §§ 44.62.330-630.

255. *Id.* § 44.62.330(a), (b). The Division of Insurance has never been listed as one of the state agencies subject to APA procedures for administrative adjudica-

weighs heavily in this decision. Hearing officers who handle Division of Insurance matters also handle hearings for the Division of Occupational Licensing, which is required to follow APA procedures for administrative adjudication.²⁵⁶ Additionally, APA procedures provide a familiar framework for both the hearing officers²⁵⁷ and the Division of Insurance in an area in which there is otherwise no guidance. The director of insurance, however, probably has discretion to not follow the APA.

At an APA hearing, the Alaska Rules of Civil Procedure control discovery and evidentiary rulings, though the Rules of Evidence are substantially relaxed. For example, a certified copy of any document from the files of the Division of Insurance will be admissible at a hearing²⁵⁸ and hearsay evidence may be admitted into the record.²⁵⁹ The APA also allows admission of affidavits into evidence in place of testimony under certain circumstances.²⁶⁰

At the hearing, the party with the burden of going forward will generally present its case first. The hearing officer has discretion to allow the parties to present their cases in reverse order if they agree, or if the convenience of witnesses necessitates it. The party asserting the affirmative side of an issue bears the burden of proof,²⁶¹ and the preponderance of the evidence standard generally applies at a hearing.²⁶² For some violations, the code requires

tion. In contrast, when promulgating regulations, the APA procedures apply to all state agencies. *Id.* § 44.62.040(a).

256. *See id.* § 44.62.330(a) (listing boards that comprise the Division of Occupational Licensing).

257. The hearing officer is an employee of the Department of Commerce and Economic Development, not the Division of Insurance. As a matter of practice, prior to the hearing officer's decision, there is no communication about a case between the director and the hearing officer.

258. ALASKA STAT. § 21.06.070(a) (1993).

259. "Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action." *Id.* § 44.62.460(d).

260. *Id.* § 44.62.470.

261. *See Alaska Alcoholic Beverage Control Bd. v. Malcolm, Inc.*, 391 P.2d 441, 444 (Alaska 1964). Thus, one seeking to change the status quo has the burden of proof, which is particularly important in a matter involving the initial denial of a license, where the applicant has the burden to establish that the director's decision was arbitrary, capricious and beyond his discretion. *Alaska Alcoholic Beverage Control Bd. v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

262. *See Amerada Hess Pipeline Corp. v. Alaska Pub. Utils. Comm'n*, 711 P.2d 1170, 1179 n.14 (Alaska 1986).

that the Division also prove the willfulness of an action.²⁶³ The doctrines of *res judicata* and collateral estoppel apply to administrative proceedings involving the Division.²⁶⁴

Parties in such hearings, with the hearing officer's permission, may submit closing arguments in writing. In the hearing officer's discretion, it may also be possible to supplement the record for good cause after the hearing. After the record is closed and all briefs have been submitted, the hearing officer must prepare a written decision which includes findings of fact, a determination of the issues presented, and the proposed penalty, if any.²⁶⁵ The director, however, has discretion to adopt or reject the opinion and may choose either to decide the case by himself based on the record, with or without taking additional evidence, or refer the case to the same or another hearing officer to take additional evidence.²⁶⁶ In the latter situation, a new proposed decision must be prepared. If the director decides the case himself, the parties must be given the opportunity to present either oral or written argument.²⁶⁷

Parties subject to an order of the director may appeal as of right to the superior court.²⁶⁸ The court will review the factual findings based on the substantial evidence standard.²⁶⁹ The application of the law to particular factual circumstances is committed to the sound discretion of the director, and the scope of review is limited to whether the decision was arbitrary, unreasonable or an abuse of discretion.²⁷⁰ Of course, the discretionary

263. *E.g.*, ALASKA STAT. §§ 21.22.170, 21.27.410(a)(2) & (3), 21.39.160 and 21.57.150 (1993).

264. *McKean v. Municipality of Anchorage*, 783 P.2d 1169, 1171 (Alaska 1989).

265. *Id.* § 44.62.510. The failure to include findings of fact constitutes an abuse of discretion. *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

266. ALASKA STAT. § 44.62.500(c) (1993).

267. *Id.*

268. *Id.* §§ 21.06.230, 44.62.560; *see also* ALASKA R. APP. P. 602. Courts take a broad view of what constitutes a final administrative order from which the 30 day period to appeal lies. *See Manning v. Alaska R.R. Corp.*, 853 P.2d 1120 (Alaska 1993).

269. "Under this standard, the reviewing court does not reweigh the evidence or choose between competing inferences; it only determines whether such evidence exists. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Storrs v. State Medical Bd.*, 664 P.2d 547, 554 (Alaska 1983) (citation omitted).

270. *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982). "To demonstrate an abuse of discretion, the appellant must show that the

doctrines of primary jurisdiction²⁷¹ and exhaustion of administrative remedies²⁷² may apply to preclude a party from prematurely seeking relief from the courts. And, attorney's fees incurred at an administrative hearing are not recoverable.²⁷³

V. CONCLUSION

It takes a well-funded and adequately staffed regulatory agency to keep abreast of the financial condition and activities of the over 1000 admitted insurance companies in Alaska. The legislature requires that insurer insolvencies be prevented whenever possible, and not dealt with strictly through crisis management.²⁷⁴ Similarly, with over 6000 licensees, only a well-funded and sufficiently staffed Division of Insurance can fulfill its charge of disciplining insurance code violations by those agents, brokers and adjusters that may put the property of Alaska insureds at risk. Consumers expect the insurance professional handling their money to be properly licensed and competent just as they would a doctor, architect, attorney, engineer or investment broker. Unlicensed and unauthorized insurance activity is taken seriously by Alaska's Division of Insurance. Blatant disregard for licensing procedures can result in denial of a license applied for or revocation of an existing license, in addition to a substantial fine.²⁷⁵

If there ever were days in Alaska when a party subject to sanction by the Division could secure the equivalent of a "slap on the wrist" after an informal meeting with the director, they have passed. This is not to suggest that the Division's enforcement procedure is unfair. On the contrary, it is flexible when necessary in accordance with the discretion given the director. Indeed, the Division's enforcement mechanism is probably more fair today than in the past due to more formalized procedures that create a level playing field for insurers and licensees. The 1992 Strategic Plan

agency decision was an 'expression of whim rather than an exercise of judgment.'" *Johns v. Commercial Fisheries Entry Comm'n*, 758 P.2d 1256, 1265 (Alaska 1988) (quoting *American Tel. & Tel. Co. v. United States*, 299 U.S. 232, 236-37 (1936)).

271. *State v. Zia, Inc.*, 556 P.2d 1257, 1262 (Alaska 1976).

272. *Standard Alaska Prod. Co. v. Department of Revenue*, 773 P.2d 201, 206-10 (Alaska 1989).

273. *Stepanov v. Homer Elec. Ass'n*, 814 P.2d 731, 737 (Alaska 1991); *State v. Smith*, 593 P.2d 625, 630-31 (Alaska 1979).

274. See generally ALASKA STAT. §§ 21.09.175, 21.78.010-.330 (1993); ALASKA ADMIN. CODE tit. 3, §§ 21.510-.520 (July 1993).

275. See *supra* notes 240-241 and accompanying text.

prepared by the current Director states: "We are, by law, insulated from certain types of 'political' pressure and are charged with regulating the insurance industry in the state in a professional, nonpartisan manner."²⁷⁶

Finally, lest one be overly optimistic about the capabilities of the Division of Insurance, there are some obvious limitations even with a well-funded and adequately staffed agency. Uninsurability of certain risks that are societal problems, uncertainties real or perceived with the judicial system, and rapidly fluctuating interest rates leading to cyclical insurance underwriting are examples of circumstances that can not be significantly affected by insurance regulators.²⁷⁷ Insurance cycles, like economic cycles generally, are a continuing phenomena that can be expected to repeat.²⁷⁸

Insurance regulation has come a long way from the days of essentially self-regulation when insurers merely filed forms and data with *ex-officio* regulators or legislatures. The regulation process today is complex with potentially far-reaching consequences for national and global economies. As a result, insurance regulatory issues are gaining increased attention from public policy makers across the country both at the state and federal levels. While the NAIC's accreditation program appears to be maintaining the status quo for state regulation in this area, the congressional focus on insurance regulation can be expected to continue, particularly given recent national problems with other financial institutions.

Insurance regulatory agencies are unique. No other state agency regulates financial institutions on a national and international scale. Nor is there another state agency that so heavily relies on the activities of other states' regulatory agencies. Through the NAIC, data collected by insurance regulators is shared on a national basis.

Regulatory authority over insurance is among the last few powers of government remaining nearly exclusively to the states, and Alaska has vigorously exercised its prerogative in this field. In

276. ALASKA DIVISION OF INSURANCE, 1992 STRATEGIC PLAN 19.

277. See generally DONALD S. BREAKSTONE ET AL., A.B.A. TORT & INS. PRAC. SEC, CUSHIONING AGAINST INSURANCE CYCLES (1989) (intimating that insurance cycles are inevitable).

278. *Id.* at 1 ("Crises, represented by high, perhaps ridiculously high premium rates and/or the unavailability of needed coverage, as well as advantageous market cycles, represented by low, perhaps exceedingly low, premium rates and/or market excess capacity, will be seen again.").

the interest of protecting Alaska insurance consumers, there must be a continuing recognition of the necessity for vigorous oversight of this important industry. Adequate support from the legislature, both through funding and the enactment of laws, is essential so that the Division can maintain a consistent philosophy by which to effectively balance consumers' needs with those of insurers and producers. Alaska's director of insurance has broad discretion to regulate the insurance industry pursuant to the insurance code. That discretion, coupled with the active and well-staffed enforcement mechanism resulting from the recent NAIC accreditation, should benefit Alaska insurance consumers.

